

1012-HO 260
391 907
002 1

THE
AMERICAN JOURNAL
OF
INTERNATIONAL LAW



391
002

58

VOLUME 34

1940

PUBLISHED BY

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

PUBLICATION OFFICE:
THE RUMFORD PRESS
CONCORD, N. H.

EDITORIAL AND EXECUTIVE OFFICE:
700 JACKSON PLACE, N.W.
WASHINGTON, D. C.

Copyright, 1940, by the American Society of International Law

p14,697

BOARD OF EDITORS

EDWIN M. BORCHARD, Yale Law School.
HERBERT W. BRIGGS, Cornell University.
PHILIP MARSHALL BROWN, Washington, D. C.
J. REUBEN CLARK, JR., Salt Lake City, Utah.
CLYDE EAGLETON, New York University.
CHARLES G. FENWICK, Bryn Mawr College.
MANLEY O. HUDSON, Cambridge, Mass.
CHARLES CHENEY HYDE, Columbia University Law School.
PHILIP C. JESSUP, Columbia University Law School.
ARTHUR K. KUHN, New York, N. Y.
JESSE S. REEVES, University of Michigan.
ELLERY C. STOWELL, American University.
ROBERT R. WILSON, Duke University.
LESTER H. WOOLSEY, Washington, D. C.
QUINCY WRIGHT, University of Chicago.

Honorary Editor-in-Chief

JAMES BROWN SCOTT, Washington, D. C.

Editor-in-Chief

GEORGE GRAFTON WILSON, Harvard University.

Managing Editor

GEORGE A. FINCH, 700 Jackson Place, N. W., Washington, D. C.

The object of the AMERICAN SOCIETY OF INTERNATIONAL LAW is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it will cooperate with similar societies in this and other countries.

The views expressed in the articles, editorial comments, book reviews and notices, and other contributions, which appear in these pages are those of the individual authors and are not to be taken as representing the views of the BOARD OF EDITORS or of the AMERICAN SOCIETY OF INTERNATIONAL LAW.

THE AMERICAN JOURNAL OF INTERNATIONAL LAW is supplied to all members of the SOCIETY without extra charge, as the membership fee of five dollars per annum includes the right to all issues of the JOURNAL published during the year for which the dues are paid. (Members residing in foreign countries outside the domestic postal zone pay one dollar extra per annum for foreign postage; Canada fifty cents extra.)

The annual subscription to non-members of the SOCIETY is five dollars per annum (plus the above mentioned sums for foreign postage) and should be placed with the AMERICAN SOCIETY OF INTERNATIONAL LAW, 700 Jackson Place, N. W., Washington, D. C.

Single copies of the JOURNAL will be supplied at \$1.50 per copy.

Applications for membership in the SOCIETY, correspondence with reference to the JOURNAL, and books for review should be sent to GEORGE A. FINCH, Secretary and Managing Editor, 700 Jackson Place, N. W., Washington, D. C.

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 34

CONTENTS

1940

[No. 1, January, 1940, pp. 1-192; No. 2, April, 1940, pp. 193-390; No. 3, July, 1940, pp. 391-568; No. 4, October, 1940, pp. 569-784]

	PAGE
18TH YEAR OF PERMANENT COURT OF INTERNATIONAL JUSTICE. <i>Manley O. Hudson</i>	1
SABOTAGE CLAIMS AGAINST GERMANY. <i>L. H. Woolsey</i>	23
REVISION OF NATIONALITY LAWS OF THE UNITED STATES. <i>Richard W. Flourney</i>	36
RELATIONS OFFICIEUSES AND INTENT TO RECOGNIZE. <i>Herbert W. Briggs</i>	47
RESPONSIBILITY OF STATES FOR INTERNATIONAL PROPAGANDA. <i>Vernon Van Dyke</i>	58
THE WILHELMINA. <i>John C. Crighton</i>	74
FAR EASTERN POLICIES OF THE UNITED STATES. <i>W. W. Willoughby</i>	193
EGYPT: THE TRANSITION PERIOD. <i>Jasper Y. Brinton</i>	208
AMERICAN CIVIL WAR PRECEDENTS. <i>Alice Morrissey McDiarmid</i>	220
INTERNATIONAL LAW AS AFFECTED BY THE UNITED STATES NEUTRALITY ACT AND THE RESOLUTIONS OF PANAMA. <i>Quincy Wright</i>	238
REMOVAL OF ENEMY PERSONS FROM NEUTRAL VESSELS. <i>Herbert W. Briggs</i>	249
POSITIVISM, FUNCTIONALISM, AND INTERNATIONAL LAW. <i>Hans J. Morgenthau</i>	260
PRESSENT STATUS OF NEUTRALITY. <i>Quincy Wright</i>	391
AMERICAN RIGHTS IN THE PANAMA CANAL. <i>Norman J. Padelford</i>	416
ENEMY ALIEN PROBLEM IN THE PRESENT WAR. <i>Robert M. W. Kempner</i>	443
REREADING GROTIUS IN THE YEAR 1940. <i>Durward V. Sandifer</i>	459
ORIGINS OF FRENCH PROTECTORATE OVER CATHOLIC MISSIONS IN CHINA. <i>H. M. Cole</i>	473
NEGLECTED ASPECTS OF THE DESTROYER DEAL. <i>Herbert W. Briggs</i>	569
INTERNATIONAL LAW AND SOCIAL STRUCTURE. <i>Gerhart Niemeyer</i>	588
THE PANAMA CANAL IN TIME OF PEACE. <i>Norman J. Padelford</i>	601
AGENCY IN INTERNATIONAL LAW. <i>Angelo Piero Sereni</i>	638
ENFORCEMENT OF MULTIPARTITE ADMINISTRATIVE TREATIES IN THE UNITED STATES. <i>Henry Reiff</i>	661
EDITORIAL COMMENT:	
Law of neutrality and policy of keeping out of war. <i>G. G. Wilson</i>	89
The City of Flint. <i>Charles Cheney Hyde</i>	89
The Neutrality Act of 1939. <i>Philip C. Jessup</i>	95
Duty of impartiality on part of neutral. <i>Clyde Eagleton</i>	99
Aerial flights by belligerents over neutral territory. <i>A. K. Kulón</i>	104
Armed merchantmen. <i>Edwin Borchard</i>	107
Protective jurisdiction. <i>Philip Marshall Brown</i>	112
Declaration of Panama. <i>C. G. Fenwick</i>	116
Collecting on defaulted foreign dollar bonds. <i>J. Reuben Clark, Jr.</i>	119
The neutrality of Eire. <i>Robert R. Wilson</i>	125
International law for Finland. <i>Charles Cheney Hyde</i>	285
Was Norway delinquent in the Altmark case? <i>Edwin Borchard</i>	289
The Cromwell incident. <i>Ellery C. Stowell</i>	294
Mexican Supreme Court decision in oil companies expropriation cases. <i>A. K. Kuhn</i>	297
"Cardenas Doctrine." <i>Philip Marshall Brown</i>	300
Power to declare neutrality under American law. <i>Quincy Wright</i>	302

	PAGE
Vae Victa. <i>Ellery C. Stowell</i>	310
Diversión of merchantmen. <i>Philip C. Jessup</i>	312
Interference with American mails. <i>Clyde Eagleton</i>	315
Standards of humanitarianism in war. <i>Robert R. Wilson</i>	320
Coöperation of United States in conservation of whales. <i>B. C. Stowell</i>	324
Annual meeting of the Society. <i>George A. Finch</i>	492
Time and international law. <i>George Grafton Wilson</i>	496
Government traffic in contraband. <i>L. H. Woolsey</i>	498
Changing concepts of international law. <i>Philip Marshall Brown</i>	503
In support of international law. <i>Philip C. Jessup</i>	505
Government consent to publication of diplomatic correspondence. <i>R. R. Wilson</i>	508
Transfer of destroyers to Great Britain. <i>Quincy Wright</i>	680
Attorney General's opinion on exchange of destroyers for naval bases. <i>Edwin Borchard</i>	690
Neutrality on the defensive. <i>Charles G. Fenwick</i>	697
Needs of international law. <i>Clyde Eagleton</i>	699
Leased territories. <i>George Grafton Wilson</i>	703
Monroe Doctrine in 1940. <i>Philip C. Jessup</i>	704
Japan joins the Axis. <i>Ellery C. Stowell</i>	711
CURRENT NOTES:	
Annual meeting of the Society.....	128, 332
Notice of proposed revision of the Society's Constitution.....	326
Professor Theodor Niemeyer.....	334
International law section of American Bar Association.....	335
The analytical index.....	512
James Wilford Garner memorial student loan fund.....	513
Eighth American Scientific Congress. <i>George A. Finch</i>	513
Eighth International Conference of American States. <i>George A. Finch</i>	714
CHRONICLE OF INTERNATIONAL EVENTS. <i>Dorothy R. Dart</i>	130, 336, 517, 717
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW:	
California Supreme Court: <i>People v. Stralla and Adams</i>	143
Mixed Claims Commission, U. S.-Germany: <i>Lehigh Valley R. R. Co. v. Germany</i>	154
Great Britain, Vacation Court: <i>In re Ning Yi-Ching</i>	347
New York Court of Appeals: <i>Lamont v. Travelers Insurance Co.</i>	349
Great Britain, Court of Criminal Appeal: <i>Rex v. Ketter</i>	529
Court of Appeal: <i>Kawasaki Kisen Kabushiki v. Bantam S. S. Co.</i>	533
U. S. Atty. Gen.; Exchange of destroyers for naval and air bases.....	728
Arbitral award: <i>Sudden & Christenson v. United States</i>	737
BOOK REVIEWS AND NOTES.....	165, 357, 537, 753
BOOKS RECEIVED.....	188, 384, 564, 783
PERIODICAL LITERATURE OF INTERNATIONAL LAW. <i>Eleanor H. Finch</i>	191, 386, 567, 784
INDEX.....	785
SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)	

BOARD OF EDITORS

EDWIN M. BORCHARD, Yale Law School.
HERBERT W. BRIGGS, Cornell University.
PHILIP MARSHALL BROWN, Washington, D. C.
J. REUBEN CLARK, JR., Salt Lake City, Utah.
CLYDE EAGLETON, New York University.
CHARLES G. FENWICK, Bryn Mawr College.
MANLEY O. HUDSON, Cambridge, Mass.
CHARLES CHENEY HYDE, Columbia University Law School.
PHILIP C. JESSUP, Columbia University Law School.
ARTHUR K. KUHN, New York, N. Y.
JESSE S. REEVES, University of Michigan.
ELLERY C. STOWELL, American University.
ROBERT R. WILSON, Duke University.
LESTER H. WOOLSEY, Washington, D. C.
QUINCY WRIGHT, University of Chicago.

Honorary Editor-in-Chief

JAMES BROWN SCOTT, Washington, D. C.

Editor-in-Chief

GEORGE GRAFTON WILSON, Harvard University

Managing Editor

GEORGE A. FINCH, 700 Jackson Place, N. W., Washington, D. C.

THE object of the AMERICAN SOCIETY OF INTERNATIONAL LAW is to foster the study of international law and promote the establishment of international relations on the basis of law and justice. For this purpose it will coöperate with other societies in this and other countries having the same object.

The views expressed in the articles, editorial comments, book reviews and notices, and other contributions, which appear in these pages are those of the individual authors and are not to be taken as representing the views of the BOARD OF EDITORS or of the AMERICAN SOCIETY OF INTERNATIONAL LAW.

THE AMERICAN JOURNAL OF INTERNATIONAL LAW is supplied to all members of the SOCIETY without extra charge, as the membership fee of five dollars per annum includes the right to all issues of the JOURNAL published during the year for which the dues are paid. (Members residing in foreign countries outside the domestic postal zone pay one dollar extra per annum for foreign postage; Canada fifty cents extra.)

The annual subscription to non-members of the SOCIETY is five dollars per annum (plus the above mentioned sums for foreign postage) and should be placed with the AMERICAN SOCIETY OF INTERNATIONAL LAW, 700 Jackson Place, N. W., Washington, D. C.

Single copies of the JOURNAL will be supplied at \$1.50 per copy.

Applications for membership in the SOCIETY, correspondence with reference to the JOURNAL, and books for review should be sent to GEORGE A. FINCH, Secretary and Managing Editor, 700 Jackson Place, N. W., Washington, D. C.

CONTENTS

	PAGE
EIGHTEENTH YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE: <i>Manley O. Hudson</i>	1
THE SABOTAGE CLAIMS AGAINST GERMANY. <i>L. H. Woolsey</i>	28
REVISION OF NATIONALITY LAWS OF THE UNITED STATES. <i>Richard W. Flournoy</i>	36
RELATIONS OFFICIEUSES AND INTENT TO RECOGNIZE. <i>Herbert W. Briggs</i>	47
RESPONSIBILITY OF STATES FOR INTERNATIONAL PROPAGANDA. <i>Vernon Van Dyke</i> ..	58
THE WILHELMINA. <i>John C. Crighton</i>	74
EDITORIAL COMMENT:	
Law of neutrality and the policy of keeping out of war. <i>G. G. Wilson</i>	89
The City of Flint. <i>Charles Cheney Hyde</i>	89
✓ The "Neutrality Act of 1939." ✓ <i>Philip C. Jessup</i>	95
Duty of impartiality on the part of a neutral. <i>Clyde Eagleton</i>	99
✓ Aerial flights by belligerents over neutral territory. ✓ <i>Arthur K. Kuhn</i>	104
✓ Armed merchantmen. ✓ <i>Edwin Borchard</i>	107
✓ Protective jurisdiction. ✓ <i>Philip Marshall Brown</i>	112
The Declaration of Panama. <i>C. G. Fenwick</i>	116
Collecting on defaulted foreign dollar bonds. <i>J. Reuben Clark, Jr.</i>	119
✓ The neutrality of Eire. <i>Robert R. Wilson</i>	125
CURRENT NOTE: Annual meeting of the Society.....	128
CHRONICLE OF INTERNATIONAL EVENTS. <i>Dorothy R. Dart</i>	130
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW:	
Supreme Court of California: <i>The People v. Stralla and Adams</i>	143
Mixed Claims Commission, United States-Germany: <i>Lehigh Valley Railroad Co. et al. v. Germany</i>	154
BOOK REVIEWS AND NOTES:	
Sandifer, <i>Evidence before International Tribunals</i> , 165; Silvanie, <i>Responsibility for Acts of Unsuccessful Insurgent Governments</i> , 166; Stephens, <i>Revisions of Treaty of Versailles</i> , 166; Drago: <i>Discursos y Escritos</i> , 167; <i>Giurisprudenza Comparata di Diritto Internazionale Privato</i> , 169; Maxwell, <i>International Relations</i> , 170; Chambers, <i>The War Behind the War, 1914-1918</i> , 171; Baumgarten, <i>Grundsätze der juristischen Methodenlehre</i> , 172; Keller, <i>Der Kampf um die Völkerordnung</i> , 173; Baehr, <i>Katholische Solidarität und Volksgemeinschaft</i> , 173; Hahn, <i>Grundfragen Europäischer Ordnung</i> , 173; Schmitt, <i>Völkerrechtliche Grossraumordnung</i> , 173.	
Briefer notices: Van Hamel, 176; Nicholson, 177; <i>Conferencias Internacionales Americanas</i> , 177; Guatemala, White Book, 177; <i>Diplomatic Correspondence of the United States, 1851-1860: Spain</i> , 178; <i>Diritto Internazionale</i> , 1938, 178; Decleva, 179; Farnsworth, 179; Walz, 179; Gantenbein, 180; Hofheinz, 180; Rheinstrom, 181; Lunau, 181; Newfang, 181; Warbasse, 182; Marshall, 182; Brown, Hodges and Roucek, 183; Reynolds, 183; Dallas, Institute of Public Affairs, 184; Linebarger, 184; Kerner, 185; Grotius Society, 185; Raape, 186; Koepfel, 187.	
Books Received.....	188
PERIODICAL LITERATURE OF INTERNATIONAL LAW. <i>Eleanor H. Finch</i>	191
SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)	

BOARD OF EDITORS

EDWIN M. BORCHARD, Yale Law School.
HERBERT W. BRIGGS, Cornell University.
PHILIP MARSHALL BROWN, Washington, D. C.
J. REUBEN CLARK, JR., Salt Lake City, Utah.
CLYDE EAGLETON, New York University.
CHARLES G. FENWICK, Bryn Mawr College.
MANLEY O. HUDSON, Cambridge, Mass.
CHARLES CHENEY HYDE, Columbia University Law School.
PHILIP C. JESSUP, Columbia University Law School.
ARTHUR K. KUHN, New York, N. Y.
JESSE S. REEVES, University of Michigan.
ELLERY C. STOWELL, American University.
ROBERT R. WILSON, Duke University.
LESTER H. WOOLSEY, Washington, D. C.
QUINCY WRIGHT, University of Chicago.

Honorary Editor-in-Chief

JAMES BROWN SCOTT, Washington, D. C.

Editor-in-Chief

GEORGE GRAFTON WILSON, Harvard University

Managing Editor

GEORGE A. FINCH, 700 Jackson Place, N. W., Washington, D. C.

The object of the AMERICAN SOCIETY OF INTERNATIONAL LAW is to foster the study of international law and promote the establishment of international relations on the basis of law and justice. For this purpose it will cooperate with other societies in this and other countries having the same object.

The views expressed in the articles, editorial comments, book reviews and notices, and other contributions, which appear in these pages are those of the individual authors and are not to be taken as representing the views of the BOARD OF EDITORS or of the AMERICAN SOCIETY OF INTERNATIONAL LAW.

THE AMERICAN JOURNAL OF INTERNATIONAL LAW is supplied to all members of the SOCIETY without extra charge, as the membership fee of five dollars per annum includes the right to all issues of the JOURNAL published during the year for which the dues are paid. (Members residing in foreign countries outside the domestic postal zone pay one dollar extra per annum for foreign postage; Canada fifty cents extra.)

The annual subscription to non-members of the SOCIETY is five dollars per annum (plus the above mentioned sums for foreign postage) and should be placed with the AMERICAN SOCIETY OF INTERNATIONAL LAW, 700 Jackson Place, N. W., Washington, D. C.

Single copies of the JOURNAL will be supplied at \$1.50 per copy.

Applications for membership in the SOCIETY, correspondence with reference to the JOURNAL, and books for review should be sent to GEORGE A. FINCH, Secretary and Managing Editor, 700 Jackson Place, N. W., Washington, D. C.

341
002



CONTENTS

	PAGE
FAR EASTERN POLICIES OF THE UNITED STATES. <i>W. W. Willoughby</i>	193
EGYPT: THE TRANSITION PERIOD. <i>Jasper Y. Brinton</i>✓	208 ✓
AMERICAN CIVIL WAR PRECEDENTS. <i>Alice Morrissey McDiarmid</i>	220
RIGHTS AND DUTIES UNDER INTERNATIONAL LAW AS AFFECTED BY THE UNITED STATES NEUTRALITY ACT AND THE RESOLUTIONS OF PANAMA. <i>Quincy Wright</i>	238
REMOVAL OF ENEMY PERSONS FROM NEUTRAL VESSELS. <i>H. W. Briggs</i>✓	249
POSITIVISM, FUNCTIONALISM, AND INTERNATIONAL LAW. <i>Hans J. Morgenthau</i>	260
EDITORIAL COMMENT:	
International law for Finland. <i>Charles Cheney Hyde</i>	285
Was Norway delinquent in the case of the <i>Altmark</i> ? <i>Edwin Borchard</i>✓	289
The Cromwell incident. <i>Ellery C. Stowell</i>	294
Mexican Supreme Court decision in the oil companies expropriation cases. <i>Arthur K. Kuhn</i>	297
The "Cardenas Doctrine." <i>Philip Marshall Brown</i>	300
The power to declare neutrality under American law. <i>Quincy Wright</i>	302
Vae Victis. <i>Ellery C. Stowell</i>	310
The diversion of merchantmen. <i>Philip C. Jessup</i>	312
Interference with American mails. <i>Clyde Eagleton</i>	315
Standards of humanitarianism in war. <i>Robert R. Wilson</i>	320
Coöperation of the United States in conservation of whales. <i>E. C. Stowell</i>	324
CURRENT NOTES:	
Notice of proposed revision of the Society's Constitution.....	326
Annual meeting of the Society.....	332
Professor Theodor Niemeyer.....	334
International law section of American Bar Association.....	335
CHRONICLE OF INTERNATIONAL EVENTS. <i>Dorothy R. Dart</i>	336
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW:	
Great Britain, Vacation Court: In re Ning Yi-Ching and Others.....	347
New York, Court of Appeals: <i>Lamont et al. v. Travelers Insurance Co. et al.</i>	349
BOOK REVIEWS AND NOTES:	
Académie de Droit International, <i>Recueil des Cours</i> , 1933, 357; Wilson, <i>Handbook of International Law</i> , 362; Freeman, <i>International Responsibility of States for Denial of Justice</i> , 363; Scott, <i>Law, the State and the International Community</i> , 365; Whittlesey, <i>The Earth and the State</i> , 366; Renn, <i>Relation of War to Society</i> , 367; Rafuse, <i>Extradition of Nationals</i> , 368; <i>Papers and Documents Relating to the Foreign Relations of Hungary</i> , 368; Strong, <i>Austria: Transition from Empire to Republic</i> , 370; Hammar skjöld, <i>Juridiction Internationale</i> , 371; Hulen, <i>Inside the Department of State</i> , 371; Dulles and Armstrong, <i>Can America Stay Neutral?</i> 373; Beneš, <i>Democracy Today and Tomorrow</i> , 373.	
Briefer notices: Haynes, 374; Eliot, 375; Wright, 375; Walz, 376; Medlicott, 376; Hudson, 377; D'Ormesson, 377; Pellizzi, 378; Ebenstein, 378; Schreiber, 378; Robertson, 378; Ago, 379; Salter, 380; <i>International Security</i> , 380; International Studies Conference, 380; Amery, 381; Bullock, 381; Roberts, 381; Benson, 382; Seton-Watson, 382; Lloyd, 382; Laurie, 382; Richardson, 383.	
Books Received.....	384
PERIODICAL LITERATURE OF INTERNATIONAL LAW. <i>Eleanor H. Finch</i>	386
SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)	

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 34

July, 1940

NO. 3

CONTENTS

	PAGE
✓ THE PRESENT STATUS OF NEUTRALITY. <i>Quincy Wright</i>	391
AMERICAN RIGHTS IN THE PANAMA CANAL. <i>Norman J. Padelford</i>	416
THE ENEMY ALIEN PROBLEM IN THE PRESENT WAR. <i>Robert M. W. Kempner</i>	443
REREADING GROTTUS IN THE YEAR 1940. <i>Durward V. Sandifer</i>	459
ORIGINS OF THE FRENCH PROTECTORATE OVER CATHOLIC MISSIONS IN CHINA. <i>H. M. Cole</i>	473
EDITORIAL COMMENT:	
Annual meeting of the Society. <i>George A. Finch</i>	492
Time and international law. <i>George Grafton Wilson</i>	496
Government traffic in contraband. <i>L. H. Woolsey</i>	498
✓ Changing concepts of international law. <i>Philip Marshall Brown</i>	503
✓ In support of international law. <i>Philip C. Jessup</i>	505
Government consent to publication of diplomatic correspondence. <i>R. R. Wilson</i>	508
CURRENT NOTES:	
The analytical index.....	512
James Wilford Garner Memorial Student Loan Fund.....	513
Eighth American Scientific Congress. <i>George A. Finch</i>	513
CHRONICLE OF INTERNATIONAL EVENTS. <i>Dorothy R. Dart</i>	517
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW:	
Great Britain:	
Court of Criminal Appeal: <i>Rex v. Ketter</i>	529
Court of Appeal: <i>Kawasaki Kisen Kabushiki of Kobe v. Batnam S.S. Co.</i>	533
BOOK REVIEWS AND NOTES:	
Keeton and Schwarzenberger, <i>Making International Law Work</i> , 537; Olson, <i>Scandinavia: The Background for Neutrality</i> , 537; Huart, <i>Nederlands Aandeel in de Ontwikkeling van het Onzijdigheidsrecht gedurende den Wereldoorlog</i> , 539; Shotwell, <i>What Germany Forgot</i> , 540; Wambaugh, <i>The Saar Plebiscite</i> , 541; Ziegler, <i>International Law of John Marshall</i> , 542; Bailey, <i>Diplomatic History of the American People</i> , 543; Jones and Myers, <i>Documents on American Foreign Relations</i> , 543; Zimmern, <i>University Teaching of International Relations</i> , 544; Hishida, <i>Japan Among the Great Powers</i> , 545; Kazlauskas, <i>L'Entente Baltique</i> , 546; Halperin, <i>Italy and the Vatican at War</i> , 547; Ford, <i>Dictatorship in the Modern World</i> , 548; Santoro, <i>Hüller Germany as Seen by a Foreigner</i> , 549; Loewenstein, <i>Hüller's Germany</i> , 549; Rappard, <i>Quest for Peace</i> , 550; Harper, <i>English Navigation Laws</i> , 552; Fujii, <i>Essentials of Japanese Constitutional Law</i> , 553.	
Briefer notices: Cock, 554; Stuyt, 554; Kaltenbach, 554; Sandiford, 555; <i>Rights of Performers in Broadcasting</i> , etc., 555; Barlow, 556; Wiskemann, 556; Saerchinger, 557; American Philosophical Society, 557; Jennings, 558; Mowat, 558; Hill and Stoke, 559; Ogg, 559; Sayre, 560; Lockey, 560; <i>Handbook of Latin American Studies</i> , 561; Sastry, 561; Office International des Musées, 562; Quadri, 562; Venturini, 562; Sperduti, 562.	
Books Received.....	564
PERIODICAL LITERATURE OF INTERNATIONAL LAW. <i>Eleanor H. Finch</i>	567
SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)	

BOARD OF EDITORS

EDWIN M. BORCHARD, Yale Law School.
HERBERT W. BRIGGS, Cornell University.
PHILIP MARSHALL BROWN, Washington, D. C.
J. REUBEN CLARK, JR., Salt Lake City, Utah.
CLYDE EAGLETON, New York University.
CHARLES G. FENWICK, Bryn Mawr College.
MANLEY O. HUDSON, Cambridge, Mass.
CHARLES CHENEY HYDE, Columbia University Law School.
PHILIP C. JESSUP, Columbia University Law School.
ARTHUR K. KUHN, New York, N. Y.
JESSE S. REEVES, University of Michigan.
ELLERY C. STOWELL, American University.
ROBERT R. WILSON, Duke University.
LESTER H. WOOLSEY, Washington, D. C.
QUINCY WRIGHT, University of Chicago.

Honorary Editor-in-Chief

JAMES BROWN SCOTT, Washington, D. C.

Editor-in-Chief

GEORGE GRAFTON WILSON, Harvard University

Managing Editor

GEORGE A. FINCH, 700 Jackson Place, N. W., Washington, D. C.

The object of the AMERICAN SOCIETY OF INTERNATIONAL LAW is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it will coöperate with similar societies in this and other countries.

The views expressed in the articles, editorial comments, book reviews and notices, and other contributions, which appear in these pages are those of the individual authors and are not to be taken as representing the views of the BOARD OF EDITORS or of the AMERICAN SOCIETY OF INTERNATIONAL LAW.

THE AMERICAN JOURNAL OF INTERNATIONAL LAW is supplied to all members of the SOCIETY without extra charge, as the membership fee of five dollars per annum includes the right to all issues of the JOURNAL published during the year for which the dues are paid. (Members residing in foreign countries outside the domestic postal zone pay one dollar extra per annum for foreign postage; Canada fifty cents extra.)

The annual subscription to non-members of the SOCIETY is five dollars per annum (plus the above mentioned sums for foreign postage) and should be placed with the AMERICAN SOCIETY OF INTERNATIONAL LAW, 700 Jackson Place, N. W., Washington, D. C.

Single copies of the JOURNAL will be supplied at \$1.50 per copy.

Applications for membership in the SOCIETY, correspondence with reference to the JOURNAL, and books for review should be sent to GEORGE A. FINCH, Secretary and Managing Editor, 700 Jackson Place, N. W., Washington, D. C.

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 34

October, 1940

NO. 4

CONTENTS

	PAGE
NEGLECTED ASPECTS OF THE DESTROYER DEAL. <i>Herbert W. Briggs.</i>	569
INTERNATIONAL LAW AND SOCIAL STRUCTURE. <i>Gerhart Niemeyer.</i>	588
THE PANAMA CANAL IN TIME OF PEACE. <i>Norman J. Padelford.</i>	601
AGENCY IN INTERNATIONAL LAW. <i>Angela Piero Sereni.</i>	638
ENFORCEMENT OF MULTIPARTITE ADMINISTRATIVE TREATIES IN THE UNITED STATES. <i>Henry Reiff.</i>	661
EDITORIAL COMMENT:	
The transfer of destroyers to Great Britain. <i>Quincy Wright.</i>	680
The Attorney General's opinion on the exchange of destroyers for naval bases. <i>Edwin Borchard.</i>	690
Neutrality on the defensive. <i>Charles G. Fenwick.</i>	697
The needs of international law. <i>Clyde Eagleton.</i>	699
Leased territories. <i>George Grafton Wilson.</i>	703
The Monroe Doctrine in 1940. <i>Philip C. Jessup.</i>	704
Japan joins the Axis. <i>Ellery C. Stowell.</i>	711
CURRENT NOTE:	
Eighth International Conference of American States. <i>G. A. Finch.</i>	714
CHRONICLE OF INTERNATIONAL EVENTS. <i>Dorothy R. Dart.</i>	717
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW:	
United States Atty. Gen.: Opinion on exchange of over-age destroyers for naval and air bases	728
Arbitral award: <i>Sudden & Christenson v. United States.</i>	737
BOOK REVIEWS AND NOTES:	
Pfankuchen, <i>Documentary Textbook in International Law</i> , 753; Deák and Jessup, <i>Neutrality Laws, Regulations and Treaties</i> , 753; Fenwick, <i>American Neutrality</i> , 755; <i>United States Foreign Relations, 1924</i> , 756; <i>Lansing Papers</i> , 756; Rupp, <i>Staatsvertreter vor internationalen Schiedsgerichten</i> , 757; Kelsen, <i>Legal Technique</i> <i>in International Law</i> , 758; Yepes and Pereira da Silva, <i>Commentaire Théorique</i> <i>et Pratique du Pacte de la Société des Nations et des Statuts de l'Union Panaméri-</i> <i>caine</i> , 759; Vitta, <i>La Validité des Traités Internationaux</i> , 760; Carr, <i>The Twenty</i> <i>Years' Crisis</i> , 761; Wood, <i>Peaceful Change and the Colonial Problem</i> , 762; Sharp and Kirk, <i>Contemporary International Politics</i> , 763; Langsam, <i>The World</i> <i>Since 1914</i> , 766; Dawes, <i>Journal as Ambassador to Great Britain</i> , 767; Steiner, <i>Principles and Problems of International Relations</i> , 768; Mexican Government, <i>True Facts about the Expropriation of the Oil Companies' Properties</i> , 769; Gaither, <i>Expropriation in Mexico</i> , 769; Brooks, <i>Diplomacy and the Borderlands</i> , 771.	
Briefer notices: Butler, 772; Arató, 773; Gutierrez, 773; Antelo, 774; Jones, 774; Bigant, 774; Robbins, 775; Fen, 775; Meade, 776; Van Houtte, 776; Grotius Society, 777; Shotwell and Deák, 777; Gregory and Barnes, 778; Willoughby, 778; Telders, 779; Berkol, 779; Marriott, 780; Geshkoff, 780; Larkin, 780; Michael, 781; Catlin, 781; Knapton, 782; Tobin and Bidwell, 782.	
Books Received	783
PERIODICAL LITERATURE OF INTERNATIONAL LAW. <i>Eleanor H. Finch.</i>	784
INDEX	785
SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)	

BOARD OF EDITORS

EDWIN M. BORCHARD, Yale Law School.
HERBERT W. BRIGGS, Cornell University.
PHILIP MARSHALL BROWN, Washington, D. C.
J. REUBEN CLARK, JR., Salt Lake City, Utah.
CLYDE EAGLETON, New York University.
CHARLES G. FENWICK, Bryn Mawr College.
MANLEY O. HUDSON, Cambridge, Mass.
CHARLES CHENEY HYDE, Columbia University Law School.
PHILIP C. JESSUP, Columbia University Law School.
ARTHUR K. KUHN, New York, N. Y.
JESSE S. REEVES, University of Michigan.
ELLERY C. STOWELL, American University.
ROBERT R. WILSON, Duke University.
LESTER H. WOOLSEY, Washington, D. C.
QUINCY WRIGHT, University of Chicago.

Honorary Editor-in-Chief

JAMES BROWN SCOTT, Washington, D. C.

Editor-in-Chief

GEORGE GRAFTON WILSON, Harvard University

Managing Editor

GEORGE A. FINCH, 700 Jackson Place, N. W., Washington, D. C.

The object of the AMERICAN SOCIETY OF INTERNATIONAL LAW is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it will coöperate with similar societies in this and other countries.

The views expressed in the articles, editorial comments, book reviews and notices, and other contributions, which appear in these pages are those of the individual authors and are not to be taken as representing the views of the BOARD OF EDITORS or of the AMERICAN SOCIETY OF INTERNATIONAL LAW.

THE AMERICAN JOURNAL OF INTERNATIONAL LAW is supplied to all members of the SOCIETY without extra charge, as the membership fee of five dollars per annum includes the right to all issues of the JOURNAL published during the year for which the dues are paid. (Members residing in foreign countries outside the domestic postal zone pay one dollar extra per annum for foreign postage; Canada fifty cents extra.)

The annual subscription to non-members of the SOCIETY is five dollars per annum (plus the above mentioned sums for foreign postage) and should be placed with the AMERICAN SOCIETY OF INTERNATIONAL LAW, 700 Jackson Place, N. W., Washington, D. C.

Single copies of the JOURNAL will be supplied at \$1.50 per copy.

Applications for membership in the SOCIETY, correspondence with reference to the JOURNAL, and books for review should be sent to GEORGE A. FINCH, Secretary and Managing Editor, 700 Jackson Place, N. W., Washington, D. C.

IMPORTANT NOTICE

The present number completes Volume 34 of the JOURNAL and SUPPLEMENT. Separate title pages, tables of contents, and indexes will be found in each, as the two volumes are separately paged for separate binding. The Society will bind your copies in full library buckram for \$2.00 per volume (the SUPPLEMENT is charged for separately). The JOURNALS should be sent prepaid to the Society's office, 700 Jackson Place, N. W., Washington, D. C. Each package should indicate the name and address of the sender, and check in payment must accompany order. The color and style of binding should also be supplied.

THE EIGHTEENTH YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE *

BY MANLEY O. HUDSON

Though the eighteenth year of the Permanent Court of International Justice has been the most critical year in its history, the Court has carried on its work in a regular way and some notable additions to its jurisprudence have been made during the year.

In the early months of the year, the Court held two series of meetings, from January 19 to April 4, and from May 15 to June 15; later in the year a series of meetings was held from November 28 to December 5. The Court was in actual session during the year for a total of 116 days; this was considerably less than the average of 144 days for each of the previous seventeen years, though it exceeded the number of 69 days of actual session during the year 1938.

Three judgments were handed down during the year: a judgment in the *Panevezys-Saldutiskis Railway Case* between Estonia and Lithuania, on February 28, 1939; a judgment on a preliminary objection in the case relating to the *Electricity Company of Sofia and Bulgaria* between Belgium and Bulgaria, on April 4, 1939; and a judgment in the case relating to the *Société commerciale de Belgique* between Belgium and Greece, on June 15, 1939. In the case relating to the *Electricity Company of Sofia and Bulgaria*, an order indicating measures of interim protection was handed down on December 5, 1939. One new proceeding was instituted during the year: the so-called *Gerliczy Case* between Liechtenstein and Hungary. At the close of the year there remained on the Court's docket the case relating to the *Electricity Company of Sofia and Bulgaria*, and the *Gerliczy Case*.

Action taken by various States with reference to instruments relating to the Court reflected the political tension prevailing, though several States renewed their acceptance of the Court's obligatory jurisdiction. The election of judges which would normally have been held in 1939 was postponed, with the result that, under the provisions of the Statute, the sitting judges continue in office. The budget of the Court for 1940 was considerably reduced, but the reduction will not curtail the Court's normal activities.

THE PANEVEZYS-SALDUTISKIS RAILWAY CASE

Proceedings in this case were begun by an application by the Estonian Government, filed with the Registrar of the Court on November 2, 1937. Relying upon the declarations made by Estonia and Lithuania in accepting

* This is the eighteenth in the writer's series of annual articles on the Permanent Court of International Justice, the publication of which was begun in this JOURNAL, Vol. 17 (1923), p. 15.

the obligatory jurisdiction of the Court as provided in Article 36, paragraph 2, of the Statute, the Estonian Government contended that the Lithuanian Government had wrongfully refused to recognize the rights of an Estonian company as owner and concessionaire of the Panevezys-Saldutiskis railway line and that the Lithuanian Government should compensate the company for the illegal seizure of this line; as compensation for the injury alleged to have been suffered by the company, the Estonian Government claimed a sum of 14,000,000 gold lits with interest. Both the Estonian and the Lithuanian Governments availed themselves of the privilege of appointing judges *ad hoc*; the Estonian Government named M. Otto Strandman and the Lithuanian Government named M. Mykolas Römer's to sit in that capacity. M. André Mandelstam acted as Agent for Lithuania, and Baron Boris Nolde as Agent for Estonia.

Preliminary objections were filed by the Lithuanian Government, based upon a contention that the claim should have been a national claim not only at the time when it was presented but also at the time when the injury was suffered, and upon the alleged failure of the Estonian Government to exhaust the remedies afforded by municipal law. On June 30, 1938, the Court gave an order joining these objections to the merits, "in order that it may adjudicate in one and the same judgment upon these objections and, if need be, on the merits."¹ Later the Lithuanian Government filed a counter-memorial, in which it presented a counterclaim against the Estonian Government for 7,337,271.98 lits. Oral hearings were held by the Court from January 19 to January 30, 1939, and upon the termination of their arguments each of the Agents presented new submissions. The judgment of the Court was handed down on February 28, 1939.²

A railway company called "The First Company of Secondary Railways in Russia," organized at St. Petersburg in 1892, possessed and operated various secondary railway lines, including a line from Sventziany on the St. Petersburg-Warsaw railway to Panevezys on the Libau-Romny railway. In 1917 and early 1918 various measures were taken by Soviet authorities looking towards the nationalization of railway companies. Lithuania proclaimed its independence on February 2, and Estonia on February 24, 1918. On March 3, 1918, the Treaty of Brest-Litovsk between Germany and the Soviet Republic confirmed the abandonment of Russian sovereignty over the former Baltic provinces and Lithuania, but for some time German troops remained in occupation of Lithuanian territory. On June 28, 1918, a decree was promulgated in Russia for the nationalization of railways, supplemented by decrees of September 4, 1918, and March 4, 1919. In September, 1919, the Lithuanian Government took possession of the part of the Panevezys-Saldutiskis Railway situated in its territory; a portion of this railway later passed under Polish sovereignty. In 1920 treaties were made by the Soviet Republic with Estonia, Lithuania, and Latvia. The Treaty of Tartu of

¹ Series A/B, No. 75, p. 56. See this JOURNAL, Vol. 33 (1939), p. 5. ² Series A/B, No. 76.

February 2, 1920, between the Soviet Republic and Estonia,³ contained provisions as to the fate of private property in Estonian territory, particularly the property of joint-stock companies, Russia renouncing rights to property in Estonian territory; this treaty mentioned the First Company of Secondary Railways as one of the joint-stock companies whose shares should be handed over by the Russian Government to the Estonian Government.

After the entry into force of the Treaty of Tartu, the Estonian Government promulgated regulations concerning joint-stock companies, and on May 21, 1922, the First Company of Secondary Railways in Russia was placed under curatorship in Estonia. Some months later a general meeting of the company was held in Latvia and the Latvian portion of the railway system was ceded to a Latvian company. In 1923 the Estonian Government authorized the holding of a general meeting of the company, and at a meeting held in Tallinn on November 2, 1923, the company was reorganized with the name *Esimene Juurdeveo Raudteede Selts Venemaal*. The Estonian contention was that the First Company of Secondary Railways was thus transformed into an Estonian company. It was on behalf of this Estonian company that a claim was later made to that portion of the railway situated in Lithuanian territory. The Lithuanian Government refused to admit the claim of the *Esimene* Company, contending that the First Company of Secondary Railways no longer existed and that the *Esimene* Company was not its successor. The Estonian Government intervened in the dispute between the Estonian company and the Lithuanian Government, *i.e.*, the dispute concerning the recognition of the *Esimene* Company as entitled to the rights of the Russian company, and the jurisdiction of the Lithuanian courts to deal with a claim on behalf of the *Esimene* Company. The Estonian Government also contended that there had been a violation of a commercial convention of January 13, 1934, between Estonia and Lithuania,⁴ and a denial of justice.

The preliminary objections advanced by Lithuania were based upon the alleged "non-observance by the Estonian Government (1) of the rule of international law that a claim must be national not only at the time of its presentation but also at the time of the injury, and (2) of the rule requiring the exhaustion of the remedies afforded by municipal law." The Court dealt with these two contentions. It first referred to the character of preliminary objections as envisaged in Article 62 of the Rules of Court, and then said that "Article 62 covers more than objections to the jurisdiction of the Court . . . it covers any objection of which the effect will be, if the objection is upheld, to interrupt further proceedings in the case, and which it will therefore be appropriate for the Court to deal with before enquiring into the merits."

³ 11 League of Nations Treaty Series, p. 29.

⁴ 148 League of Nations Treaty Series, p. 337.

The Court stated that the first Lithuanian objection was based on a rule of international law "that in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law." It was said that "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection." Hence a State is not entitled to espouse a claim growing out of the injury done to the national of another State. The Court concluded that the Lithuanian Agent is "right in maintaining that Estonia must prove that at the time when the injury occurred which is alleged to involve the international responsibility of Lithuania the company suffering the injury possessed Estonian nationality." The grounds on which Lithuania disputes the national character of the claim in this case "cannot be separated from those on which Lithuania disputes the Company's alleged right to the ownership of the Panevezys-Saldutiskis railway." This latter question forms a part of the merits of the dispute. In so far as interpretation of the Treaty of Tartu is involved, this question also has an intimate bearing on the nationality issue raised by the Lithuanian objection. The conclusion reached was that the first Lithuanian objection is not "one which in the particular circumstances of the case can be decided without passing on the merits." For this reason the objection was not admitted by the Court.

The rule requiring exhaustion of the remedies afforded by municipal law was not disputed by the Estonian Agent, but he contended that the case fell within admitted exceptions to the rule. The Estonian Agent first argued that Lithuanian courts had no jurisdiction to entertain a suit by the *Estimene* Company to establish the company's title to the railway. In the opinion of the Court this question depended on Lithuanian law and fell to be decided by Lithuanian courts; in the absence of a clear determination by the Lithuanian courts that they had no jurisdiction to entertain such a suit, the Court was unable to say that the rule as to exhaustion of legal remedies did not apply. The Estonian Agent also maintained that the Supreme Court of Lithuania had already held that there was no continuity between the Russian company and the Estonian company, and that in view of this decision it was unnecessary for the company to institute a proceeding in the Lithuanian courts. The case in which the Estonian Agent found such a determination by the Supreme Court of Lithuania, the so-called *Jeglinas Case*,⁵ was merely a case in which the Lithuanian court had determined that no evidence had been offered which would show the identity of the two companies. Hence the Court did not find in the *Jeglinas Case* any basis for applying the alleged exception to the rule as to the exhaustion of local remedies. The conclusion of the Court was that "neither of the reasons put forward by the Estonian Agent for the non-application of the rule as to the exhaustion of the local

⁵ See Series C, No. 86, p. 117.

means of redress can therefore be regarded as holding good in the present case."

As it was possible for the Court to give a decision on the second preliminary objection without in any way adjudicating upon the merits, the objection was regarded as one which could be "entertained as an objection of a preliminary character." The result was a declaration in the operative part of the judgment that the objection regarding the non-exhaustion of the remedies afforded by municipal law was well founded, and that the claim presented by the Estonian Government could not be entertained.

This result was reached by ten votes to four. Count Rostworowski and Judge de Visscher gave a separate opinion contending that the first Lithuanian objection should have been adjudicated upon and should have been declared to be well founded; this view was shared also by Judge *ad hoc* Römer's. Judges van Eysinga, Hudson, and Erich dissented on various grounds, each of them issuing a dissenting opinion; Judge Altamira also dissented, but without writing a separate opinion.

THE ELECTRICITY COMPANY OF SOFIA AND BULGARIA

This proceeding was instituted by an application filed with the Registry of the Court on January 26, 1938. The Belgian Government, as applicant, based the jurisdiction of the Court on (1) the declarations by which Belgium and Bulgaria had accepted the obligatory jurisdiction of the Court as provided for in Article 36, paragraph 2, of the Statute; and (2) the Belgian-Bulgarian treaty of conciliation, arbitration and judicial settlement of June 23, 1931.⁶ The Bulgarian Government nominated M. Theohar Papazoff as Judge *ad hoc*. M. J. G. de Ruelle, assisted by M. René Marcq and M. Henri Rolin, served as the Agent of the Belgian Government, and M. Ivan Altinoff, assisted by Professor Gilbert Gidel, served as the Agent of the Bulgarian Government.

The Electricity Company of Sofia and Bulgaria, a Belgian company, was the owner of a concession for the distribution of electric current for light and power, originally granted to a French company by the Municipality of Sofia in 1898. During the war of 1914-1918 the works of the Belgian company were taken over by the Municipality of Sofia. In application of Article 182 of the Treaty of Neuilly, the Belgo-Bulgarian Mixed Arbitral Tribunal gave a judgment in 1923 decreeing the restitution of the Belgian company's property and the restoration of its pre-war position, and nominating a commission of experts to fix a flexible tariff and to assess the indemnity to be paid.⁷ By a final judgment given by the Mixed Arbitral Tribunal on May 27, 1925, a formula was laid down for fixing the selling price of electricity.⁸ The application of this formula seems to have given no difficulty until 1934, when the determination of various factors of the formula was drawn into

⁶ 137 League of Nations Treaty Series, p. 191.

⁷ 3 *Décisions des Tribunaux Arbitraux Mixtes*, p. 308. ⁸ 5 *idem*, p. 759.

question; this led the company to seek a further judgment of the Mixed Arbitral Tribunal, but on December 29, 1926, that tribunal refused to entertain the application. Meanwhile the Municipality of Sofia had instituted a suit against the company before the Regional Court of Sofia for the determination of its rights and obligations in respect to the selling price of electric current; the jurisdiction of the Regional Court was unsuccessfully contested by the company, and in its decision of October 24, 1936 on the merits that court found in favor of the municipality. Both parties thereupon appealed to the Sofia Court of Appeal which gave its judgment on March 27, 1937; the company then appealed against this judgment to the Court of Cassation. Meanwhile early in 1936 a new income tax law was promulgated in Bulgaria which also gave rise to some contestation. When the Belgian Government proposed to the Bulgarian Government that a case should be referred to the Permanent Court of International Justice by special agreement, the Bulgarian authorities contended that the dispute was within the exclusive competence of the Bulgarian tribunals.

On July 2, 1938, the Belgian Government requested the indication of interim measures of protection in this case. At a hearing on this request held on July 13, 1938, the Belgian Agent stated that his government would offer no objection to the granting of time to the Bulgarian Government for a reply, and this course was taken. On August 26, 1938, following a communication made by the Bulgarian Agent, the Belgian Government withdrew this request for the indication of interim measures.

On November 25, 1938, the Bulgarian Government advanced a preliminary objection to the jurisdiction of the Court. In the course of public sittings held on February 27 and 28 and March 1, 1939, the Court heard arguments with reference to this objection. The Court's judgment on the Bulgarian objection was handed down on April 4, 1939.⁹

On August 12, 1921, Bulgaria ratified a declaration under Article 36, paragraph 2, accepting the obligatory jurisdiction of the Court without any reservation apart from the condition of reciprocity and without limit of time. By a declaration made on September 25, 1925, and ratified on March 10, 1926, Belgium accepted the Court's jurisdiction for a period of fifteen years "in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, except in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement." On June 23, 1931, the two States entered into a treaty of conciliation, arbitration and judicial settlement which followed quite closely a model proposed by the Assembly of the League of Nations in 1928.¹⁰ Ratifications of this treaty were exchanged on February 4, 1933, and the treaty then entered into force for a period of five years, expiring on February 4, 1938; it was to remain in force for an additional period of five years after that date if not "denounced at least six months

⁹ Series A/B, No. 77.

¹⁰ Records of Ninth Assembly, Plenary, p. 502.

before the expiration of this period," but it was so denounced by Bulgaria. Clearly the treaty was in force on January 26, 1938, the date of the filing of the Belgian application in this case. The treaty provides that the Court shall have jurisdiction over all disputes with regard to which the parties are in conflict with regard to their respective rights, unless the parties agree to have resort to an arbitral tribunal, adding "it is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute" of the Court. It is also provided in Article 3 of the treaty that in the case of a dispute "the occasion of which, according to the municipal law of one of the High Contracting Parties, falls within the competence of its judicial or administrative authorities, the Party in question may object to the matter in dispute being submitted for settlement" under the treaty "until a decision with final effect has been pronounced within a reasonable time by the competent authority"; the party which desires then to apply the treaty must notify the other party of its intention within a period of one year from the date of such a decision.

Both the Belgian and the Bulgarian Governments relied on the declarations and the treaty to establish their respective contentions. In the written proceedings "neither the Bulgarian Government nor the Belgian Government at any time considered the possibility that either of these agreements might have imposed some restriction on the normal operation of the other during the period for which they were both in force." The Court concludes that the two governments were throughout in agreement that their declarations and the treaty were in force at the same time. "The multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain." By concluding the treaty the parties did not intend "to weaken the obligations which they had previously entered into with a similar purpose," and this was especially true "where such obligations were more extensive than those ensuing from the treaty." Hence the Court concluded that it could decline to entertain the Belgian application only if the objection were held to be well founded both under the treaty and under the declarations.

With respect to the application of the treaty, the Bulgarian Government complained of the silence of the Belgian memorial as to the respective "rights" in regard to which the parties were in conflict, but the Court came to the conclusion that this contention did not "possess the character of a preliminary objection within the meaning of Article 62 of the Rules." The Bulgarian Government also contended that the Belgian application was filed before a final decision of the Bulgarian Court of Cassation, and was therefore premature and irregular so as to bring into play the provision in Article 3 of the treaty; the Belgian Government contended, however, that the appeal to the Court of Cassation constituted an extraordinary remedy

which was not within the provision of Article 3 of the treaty, and that in any case, as the appeal had been lodged before the application was filed with the Court, the condition as to a final decision was fulfilled. The Court held that the judgment of the Sofia Court of Appeals was not a decision with final effect within the meaning of Article 3 of the treaty, and that the effect of the treaty was to require the exhaustion of all appeals, including appeals to the Court of Cassation, before resort to an international tribunal. Hence it concluded that the jurisdiction of the Court could not be rested on the treaty of 1931.

The Court then proceeded to deal with its jurisdiction under the so-called "declarations of adherence to the Optional Clause." The Bulgarian Government relied on the limitation *ratione temporis* embodied in the Belgian declaration concerning the situations or facts with regard to which the dispute must have arisen. The parties were agreed that the dispute arose on June 24, 1937, but the Bulgarian Government contended that the dispute related to a situation which dated back to a period before that date and before March 10, 1926, when the Belgian declaration had become operative. The formula for computing the price of electric current had been established by awards given by the Mixed Arbitral Tribunal in 1923 and 1925, and as the Belgian Government's complaint related to the application of this formula, it was contended that the dispute related to a situation antedating March 10, 1926, and was, therefore, a dispute to which the Belgian declaration did not apply. On this point the Court recalled what had been said in the case relating to *Phosphates in Morocco*;¹¹ it declared that "the only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction accepted in the terms of the Belgian declaration are those which must be considered as being the source of the dispute." While the awards of the Mixed Arbitral Tribunal constitute "the source of the rights" claimed by the Belgian company, "they did not give rise to the dispute." Hence the Court considered that the Bulgarian argument based on the limitation *ratione temporis* in the Belgian declaration was not well founded, and it proceeded to affirm its jurisdiction under the optional clause with respect to the main part of the Belgian claim. With respect to that part of the Belgian Government's claim which was based upon the Bulgarian income tax law of 1936, however, the Court upheld the Bulgarian contention that this claim did not form the subject of a dispute between the two governments prior to the filing of the Belgian application. Under either the treaty of 1931 or the optional clause the Belgian Government had the burden of proving that a dispute had arisen between the two governments; and hence this part of the application of the Belgian Government was dismissed.

This result was reached by nine votes to five. Judges Anzilotti, Urrutia, van Eysinga, and Hudson, and Judge *ad hoc* Papazoff dissented. Four of the dissenting judges reached the conclusion that during the five-year period

¹¹ Series A/B, No. 74.

when the treaty was in force, the jurisdiction of the Court could be derived from the treaty alone. As it was stated by Judge Anzilotti, "the entry into force of the Belgo-Bulgarian Treaty of June 23, 1931, suspended for the whole term of the Treaty, namely from February 4, 1933, until February 4, 1938, the applicability of the Agreement resulting from the Belgian and Bulgarian Declarations accepting the Court's compulsory jurisdiction." It was also stated by Judge Urrutia: "If it is inadmissible under municipal law that the jurisdiction of the Court should be governed by one law which establishes its jurisdiction and by another law which excludes it, it is equally impossible to contemplate a parallel situation in international law." The same thought was put by Judge van Eysinga: "To try to apply at one and the same time two systems the second of which was adopted precisely in order to modify the first seems a difficult thing to do and one which must necessarily lead to results which in themselves show the inconsistency of such an attempt." In a separate concurring opinion, Judge de Visscher expressed the view that the declarations and the treaty constituted "two separate and independent sources of jurisdiction"; being "coördinated instruments" which are "fully consistent one with the other," they should "be applied not as alternatives, but concurrently."

Following the delivery of the judgment the Court made an order setting time limits for the filing of further documents of the written proceedings. These time limits expired on October 4, 1939, the date set for the filing of the Bulgarian rejoinder; at this time, however, the Bulgarian Agent found himself prevented by *force majeure* from presenting a rejoinder, and the time limit was extended to January 4, 1940.

Meanwhile on October 14, 1939, a "second" request for the indication of interim measures of protection was made by the Belgian Agent. It was stated that on August 1, 1939, the Municipality of Sofia had brought a petitory action against the Belgian company on the basis of previous judgments, and that the Belgian company was menaced with measures of execution which would paralyze its efforts to reestablish its rights. The Court was asked to indicate as a conservatory measure that the action thus instituted should be suspended until the pronouncement of the Court's judgment on the merits of the case. The time limit set for the filing of the Bulgarian observations on this request expired on November 24, 1939. On November 18, 1939, the Bulgarian Agent telegraphed that on account of the war it was impossible for him to collaborate with his foreign advocates for the preparation of the Bulgarian defense, and that since a journey to The Hague would require a traversing of belligerent countries, thus involving serious risks for their personal security, the Bulgarian Government had forbidden the departure of its national judge and its Agent; that in these circumstances of *force majeure*, the Bulgarian Government did not consider itself bound to present any observations, though many grounds existed for the rejection of the Belgian request.

When the Court met in a public sitting on December 4, neither the Bulgarian judge *ad hoc* nor the Bulgarian Agent was present; the Belgian Agent, assisted by counsel, appeared and presented an argument in favor of the Belgian request. On December 5, 1939, the Court issued an order ¹² in which it declared that the circumstances justified the indication of interim measures; and in the operative part of the order it indicated that, pending the Court's final judgment, the State of Bulgaria should see to it that no step of any kind is taken which might prejudice the rights claimed by the Belgian Government or aggravate or extend the dispute submitted to the Court. Thus, for the first time in eighteen years, the Court, as distinguished from its President, exercised the power conferred upon it by Article 41 of the Statute.

SOCIÉTÉ COMMERCIALE DE BELGIQUE

On May 5, 1938, the Belgian Government filed an application instituting the proceedings in this case against the Greek Government. To found the jurisdiction of the Court the application invoked a treaty of conciliation, arbitration, and judicial settlement of June 25, 1929, between Belgium and Greece.¹³ The Greek Government appointed Mr. C. G. Ténékidès as Judge *ad hoc*. M. F. Muûls, assisted by M. Sand and M. Levy Morelle, served as Agent of the Belgian Government, and M. Ch. Diamantopoulos, assisted by M. Jean Youpis, as Agent of the Greek Government. The case became ready for hearing on December 20, 1938, but the hearings were not begun until several months later. On May 15-17 and 19 the Court heard oral arguments on behalf of the parties, and judgment was handed down on June 15, 1939.¹⁴

On August 27, 1925, the Greek Government entered into an agreement with the *Société commerciale de Belgique* for the construction of certain railway lines and the reconstruction of others and for the supply of the equipment necessary for the operation of these lines. The contract provided for reference to arbitration of any disputes which might arise and for the appointment of the arbitrators; and it was stipulated that the decisions of the arbitrators should be final and without appeal. In 1932 the Greek Government was forced to default on bonds which had been delivered to the company and the company was forced to discontinue its payments to sub-contractors with the result that the operations came to a standstill. The company then decided to resort to arbitration under the provisions of the contract. Its proposal of arbitration, made on July 26, 1933, was accepted on September 21, 1933, but the arbitration commission did not begin the hearing of the case until November 29, 1935. The commission which sat in Paris was composed of three eminent jurists. Its award, given on January 3, 1936, provided for the cancellation of the contract of August 27, 1925, and for the appointment of experts to

¹² The order was published on Dec. 6, 1939. For the text, see Series A/B, No. 79.

¹³ 113 League of Nations Treaty Series, p. 117. ¹⁴ Series A/B, No. 78.

fix the amount of payments to be made by each party to the other; the report of the experts was confirmed by a second award of July 26, 1936, which established that a sum of 6,771,866 gold dollars with interest was payable by the Greek Government.¹⁵ The Greek Government was substituted for the company in all matters outstanding between the company and third parties, and the company was released from certain obligations which it had contracted with reference to works and supplies. The provisions in the awards, other than those relating to the sum of money to be paid, were carried out by the Greek Government. Negotiations between the company and the Greek Government having proved to be unavailing, on May 21, 1937, the company applied for the aid of the Belgian Government in its effort to get a payment of the sum due. On June 14, 1937, the Belgian Government took up the case of the Belgian company, and having failed to obtain satisfaction for the company, it proposed that the dispute should be referred to the Permanent Court of International Justice by special agreement. When this proposal was declined, the Belgian application was filed asking the Court to decree that by refusing to carry out the arbitral awards in favor of the Belgian company the Greek Government had violated its international obligations.

In the course of the written and oral proceedings the submissions of the parties were very much modified. At the conclusion of the oral proceedings the allegation that Greece had violated her international obligations disappeared, as did also the claim for additional damages, the Belgian Government merely asking that the Court declare the awards to be binding on the Greek Government without reserve. As it was later explained, the Belgian request for an order that the Greek Government should pay by way of reparation the sum due to the company under the awards was thus replaced by a request for a declaration as to the definitive and obligatory character of the awards. The Greek Agent did not object to the modification of the Belgian submissions. The Greek submissions asked the Court to declare that the Greek Government acknowledged the awards to have the force of *res judicata*.

The Court thought that the Belgian Government had profoundly transformed the character of the case. With reference to this change it declared that the Court could not "in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character," and that "a complete change in the basis of the case submitted to the Court might affect the Court's jurisdiction." In this case, however, especially in view of the absence of an objection on the part of the Greek Agent, the Court was not disposed to regard the proceedings as irregular.

The jurisdiction of the Court in this case was not challenged, but the Court felt called upon to state that as the arbitral awards to which the

¹⁵ Series C, No. 87, pp. 36, 44.

submissions of the parties related were "final and without appeal," it was not for the Court either to confirm or annul them. The principal submission of the Belgian Government sought a declaration that the awards "are without reserve definitive and obligatory for the Greek Government," the object being to have recorded the legal situation established by the awards; as the Greek Government also asked the Court to acknowledge that the awards had the force of *res judicata*, the Court concluded that the two parties were in agreement. A further submission of the Belgian Government that the Greek Government was bound in law to execute the awards was presented as a consequence of the existence of *res judicata*; the Court thought that this Belgian submission was neither necessary nor disputed. Various submissions by the Greek Government were based upon considerations as to what would be fair and equitable. The question of Greece's capacity to pay was said to be "outside the scope of the proceedings of the Court," nor could the Court entertain a submission that the parties should negotiate an arrangement corresponding with the budgetary and monetary capacity of the debtor. Although the Court could not admit the claims of the Greek Government, it took note of a declaration made by the counsel for the Belgian Government which was in line with the Greek submissions, and which enabled the Court to declare that "the two Governments are, in principle, agreed in contemplating the possibility of negotiations with a view to a friendly settlement, in which regard would be had, amongst other things, to Greece's capacity to pay." The Court added that "such a settlement is highly desirable." In the operative part of the judgment the Court merely noted the agreement between the parties and stated that the arbitral awards were definitive and obligatory, other submissions of the parties being dismissed.

This result was reached by thirteen votes to two. Judges van Eysinga and Hudson dissented. Judge van Eysinga thought that the Court was asked to adjudicate upon the financial and monetary capacity of Greece and that the ascertainment of this fact required an expert report; he therefore favored an application of Article 50 of the Statute of the Court.

THE GERLICZY CASE

On June 17, 1939, the Princely Government of Liechtenstein filed with the Registry of the Court an application introducing proceedings with reference to an alleged dispute between Liechtenstein and Hungary "concerning the application of the Hungaro-Roumanian convention of April 16, 1924, regarding the release of deposits and the settlement of debts and credits in former Austrian or Hungarian crowns." To found the jurisdiction of the Court, the application referred to the Liechtenstein declaration of March 22, 1939, accepting the Court's obligatory jurisdiction, and invoked the Hungarian declaration of May 30, 1934. It was alleged in the application that Dr. Felix Gerliczy, a Liechtenstein national, had been ordered to pay certain

sums of money under judgments of the Royal Hungarian Curia; that these judgments disregarded and misconstrued a convention of April 16, 1924, between Rumania and Hungary,¹⁶ Dr. Gerliczy having been a Rumanian national at the time of the coming into force of that convention; that the failure to apply the international convention was an act contrary to international law; and that this act placed Hungary under a pecuniary liability to Dr. Felix Gerliczy. The applicant government, therefore, sought a declaration by the Court that the judgments of the Hungarian Curia were contrary to international law and to the Hungaro-Rumanian convention of April 16, 1924, with the result that the Hungarian Government was under an obligation to make good the damage thus caused to the applicant government or alternatively to Dr. Gerliczy.

The Liechtenstein Government appointed Dr. F. Donker Curtius as its Agent in this case, and Mr. Ladislav Gajzágó was named as Agent by the Hungarian Government. On October 18, 1939, the President made an order setting March 15, 1940, as the date for the filing of the applicant's memorial and October 15, 1940, as the date for the filing of the respondent's counter-memorial in this case.

INSTRUMENTS RELATING TO THE COURT

Some progress during the year is to be recorded with reference to the international instruments relating to the Court, and with reference to the acceptance of the Court's obligatory jurisdiction. The Protocol of Signature of December 16, 1920, to which the Statute of the Court is annexed, was signed on behalf of Egypt on May 30, 1939, but at the close of the year a ratification by Egypt had not yet been deposited. The Protocol of September 14, 1929, concerning the Adhesion of the United States to the Protocol of December 16, 1920, was also signed on behalf of Egypt on May 30, 1939.

The Protocol of Signature of December 16, 1920, to which the Statute of the Court is annexed, was signed on behalf of Nicaragua in 1929; it was ratified by Nicaragua on November 29, 1939. The ratification would seem to have brought into force the Nicaraguan declaration of September 24, 1929, accepting the Court's compulsory jurisdiction.

On March 22, 1939, the Government of Liechtenstein transmitted to the Registrar of the Court a declaration made in consequence of the resolution of the Council of the League of Nations of May 17, 1922, by which Liechtenstein accepted the obligatory jurisdiction of the Court for a period of five years. The declaration was as follows (translation):¹⁷

The Principality of Liechtenstein, represented by the Head of the Government, hereby accepts the jurisdiction of the Permanent Court of International Justice, in accordance with the Covenant of the League of Nations and with the terms of the Statute and Rules of the

¹⁶ 45 League of Nations Treaty Series, p. 403.

¹⁷ Series E, No. 15, p. 213.

Court, in respect of all disputes which have already arisen or which may arise in the future. The Principality of Liechtenstein undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

At the same time, the Principality of Liechtenstein accepts as compulsory *ipso facto* and without special convention, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute of the Court and No. 2, paragraph 4, of the Resolution of the Council of the League of Nations of May 17th, 1922, for a period of five years in any disputes which have already arisen or which may arise in the future, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement.

(Signed) Vogt, Head of the Princely Government.

With respect to this declaration the Registrar followed the procedure for which a precedent was established when a similar declaration was made by Monaco on April 26, 1937.

On May 30, 1939, the Egyptian Government made a declaration accepting the obligatory jurisdiction of the Court in the following terms (translation):¹⁸

On behalf of the Royal Egyptian Government and subject to ratification, I accept as compulsory *ipso facto* and without special agreement, in relation to any other Member of the League of Nations or to any State accepting the same obligation, that is to say on condition of reciprocity, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of its Statute, for a period of five years from the date of the deposit of the instrument of ratification, over all disputes arising after the ratification of this Declaration, with regard to situations or facts subsequent to the said ratification, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement.

The present Declaration does not apply to disputes relating to the rights of sovereignty of Egypt, or to questions which, by international law, fall exclusively within its jurisdiction.

Geneva, May 30th, 1939.

(Signed) Fakhry.

As no ratification was deposited, this declaration did not enter into force during the year 1939.

On July 12, 1939, the Government of Hungary made the following declaration (translation):¹⁹

On behalf of the Royal Hungarian Government and subject to ratification, I recognize, in relation to any other Member or State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court, as compulsory *ipso facto* and without special convention, in conformity with Article 36, paragraph 2, of the Statute of the Court, for the period from August 13th, 1939, to April 10th, 1941.

Geneva, July 12th, 1939.

(Signed) L. de Velics.

¹⁸ Series E, No. 15, p. 216.

¹⁹ League of Nations Document C. L. 105. 1939. V.

The Hungarian declaration of May 30, 1934, expired on August 13, 1939. On April 11, 1939, Hungary had given notice of its intention to withdraw from membership to the League of Nations, and for this reason the new Hungarian declaration fixed April 10, 1941, as the date until which the acceptance of jurisdiction, subject to ratification, would be valid.

On September 8, 1939, the Greek Government made a new declaration accepting the obligatory jurisdiction of the Court for a further period of five years as from September 12, 1939; this declaration, which followed *mutatis mutandis* the Greek declaration of September 12, 1934, was cast in the following terms (translation):²⁰

On behalf of the Royal Hellenic Government and subject to ratification, I recognise as compulsory *ipso facto* and without special agreement, in relation to any other Member of the League of Nations or State accepting the same obligation, that is to say, on condition of reciprocity, and for a further period of five years as from September 12th, 1939, the jurisdiction of the Permanent Court of International Justice, for the classes of disputes mentioned in Article 36, paragraph 2 of the Statute of the Court, with the exception of:

(a) Disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication;

(b) Disputes relating directly or indirectly to the application of treaties or conventions accepted by Greece and providing for another procedure.

This acceptance is effective as from the date of signature of the present declaration.

Geneva, September 8th, 1939.

(Signed) S. Polychroniadis.

On May 27, 1938, the Government of Paraguay notified the Secretary-General of the League of Nations of the withdrawal of its acceptance of the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2; comments on this withdrawal were made by the Governments of Bolivia, Belgium, Brazil, Sweden, and Czechoslovakia during the year 1938.²¹ On January 30, 1939, the Netherlands Minister for Foreign Affairs informed the Secretary-General that though it was not opposed to the denunciation by Paraguay, the Netherlands Government felt "obliged to formulate every reservation as regards the right of States to denounce treaties which do not contain a clause to that effect."²²

The outbreak of war in 1939 led to a desire of certain States to reduce their commitments under the so-called optional clause. By a letter dated September 7, 1939, received in Geneva on September 11, 1939, the Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General of the League of Nations that it would not regard its

²⁰ Document C. L. 140. 1939. V.

²¹ See this JOURNAL, Vol. 33 (1939), pp. 9-10.

²² League of Nations Official Journal, 1939, p. 235. See also, Alexander P. Fachiri, "Repudiation of the Optional Clause," 20 British Year Book of International Law (1939), p. 52.

"acceptance of the Optional Clause as covering disputes arising out of events occurring during the present hostilities."²³ The reasons for this action were explained at some length in the letter, and reference was made to the "conditions under which His Majesty's Government gave their signature to the Optional Clause" as described in a contemporary memorandum.²⁴ It was said that "the Covenant has, in the present instance, completely broken down in practice, that the whole machinery for the preservation of peace has collapsed, and that the conditions under which His Majesty's Government accepted the Optional Clause no longer exist." Parallel action was taken by other members of the British Commonwealth of Nations: by the Government of Australia in a telegram of September 7,²⁵ by the Government of New Zealand in a letter of September 7,²⁶ by the Government of the Union of South Africa in a letter of September 18,²⁷ by the Government of India in a letter of September 27, 1939,²⁸ and by the Government of Canada in a letter of December 7, 1939. By a letter of September 10, 1939, the French Government notified the Secretary-General of the League of Nations that it considered that its acceptance of the Court's obligatory jurisdiction under paragraph 2 of Article 36 of the Permanent Court of International Justice cannot henceforward be "operative in regard to disputes relating to events occurring during the course of the present war."²⁹ The letter of the French Government explained that "since the system for the settlement of international disputes established by the Covenant of the League of Nations has ceased to be regarded as uniformly and compulsorily binding upon all

²³ League of Nations Official Journal, 1939, p. 408. The British Government had previously notified the Secretary-General of the existence of a state of war. Document C. 257. M. 175. 1939. VII.

²⁴ This memorandum was published as British Parliamentary Paper, Miscellaneous, No. 12, 1929 (Cmd. 3452). The considerations which led the British Government to the signature of the Optional Clause are summed up in paragraph 24 of the memorandum as follows:

- "(1) The policy of His Majesty's Government is based on a determination to fulfill their obligations under the Covenant of the League and the Peace Pact.
- "(2) If those obligations are fulfilled, we cannot be involved in war in circumstances in which any Member of the League could claim the rights of a neutral; only Members of the League which have signed the Optional Clause can bring us before the Permanent Court under its terms, and, therefore, no dispute arising out of neutral complaints of our naval action could come before the Court. Arguments based on the state of affairs created by the old law of belligerency and neutrality are therefore irrelevant.
- "(3) If any dispute should, nevertheless, arise with another Member of the League as to the legitimacy of particular action which we have taken, it is probable that such a dispute would be more suitable for settlement by the Council than by the Court, and we have the right to bring it before the Council if we wish to do so.
- "(4) If the system erected by the Covenant and the Peace Pact breaks down, this catastrophe would sweep away the Optional Clause as well."

²⁵ League of Nations Official Journal, 1939, p. 408.

²⁶ *Ibid.*, p. 410.

²⁷ *Ibid.*, p. 407.

²⁸ *Ibid.*, p. 409.

²⁹ *Ibid.*

Members of the League of Nations, the question of belligerent and neutral rights appears in an entirely new light."

These communications were promptly drawn to the attention of the various governments. On September 25, 1939, the Swiss Government informed the Secretary-General of the League of Nations "that, while taking note of these notifications, the Swiss Federal Council has reservations to make regarding the principle which a denunciation effected in such circumstances involves";³⁰ by a letter of November 20, 1939, the Belgian Government "took note of the communications reserving its point of view"; and by a letter of November 30, 1939, a similar position was taken by the Netherlands Government.

The prevailing political situation also led certain States to reduce their commitments under the General Act for the Pacific Settlement of International Disputes, drawn up at Geneva on September 26, 1928,³¹ which confers extensive jurisdiction on the Court. This Act was first brought into force on August 16, 1929; Article 45 of the Act provided that it was concluded for a period of five years dating from its entry into force, but that it was to remain in force for further successive periods of five years in the case of contracting parties which did not denounce it at least six months before the expiration of the current period. In view of this provision a second period of five years expired on August 16, 1939, and until six months prior to that date an opportunity existed for denunciation by any State which had acceded, or for changes in the conditions of its accession. Some twenty-one States or members of the League of Nations acceded to the General Act, among them France, and the United Kingdom of Great Britain and Northern Ireland and other members of the British Commonwealth of Nations.

On February 13, 1939, the Government of the French Republic notified the Secretary-General of the League of Nations that while it intended to maintain its accession to the Act, it felt bound to "take into account the new situation arising from both the departure of certain States from the League of Nations and the interpretation given by certain Members of the League to their obligations under the Covenant"; referring to Article 39, paragraph 2, and Article 45, paragraph 4, of the General Act, the French Government made the following declaration (translation):³²

The Government of the French Republic declares that it adds to the instrument of accession to the General Act of Arbitration deposited in its name on May 21st, 1931, the reservation that in future that accession shall not extend to disputes relating to any events that may occur in the course of a war in which the French Government is involved.

On February 13, 1939, also, the British Government notified the Secretary-General of the League of Nations that it had "reached the conclusion that

³⁰ League of Nations Official Journal, 1939, p. 411.

³¹ 93 League of Nations Treaty Series, p. 343; 4 Hudson, International Legislation, p. 2529.

³² Series E, No. 15, p. 232.

in the unhappy event of their finding themselves at war at any time in the future, they could not continue to be bound by the Act as regards disputes arising in such conditions";³³ the Secretary-General was, therefore, notified that the British Government, availing itself of the provisions of Article 45 (4) and Article 39 of the General Act, would continue after August 16, 1939, to "participate" in the General Act "subject to the reservation that, as from that date, the participation of His Majesty's Government in the United Kingdom in the General Act will not, should they unfortunately find themselves involved in hostilities, cover disputes arising out of events occurring during the war." A parallel communication was made on behalf of the Government of India³⁴ and the Government of New Zealand.³⁵

On April 8, 1939, the National Government of Spain notified the Secretary-General of the League of Nations that it denounced the Spanish accession to the General Act for the Pacific Settlement of International Disputes; it was explained that this was the National Government's "first opportunity of denouncing" the Spanish accession, as the Secretariat and the signatory States had previously refused to receive any communications from the National Government.³⁶

On September 7, 1939, the Government of Australia notified the Secretary-General of the League of Nations by telegraph that it would not "regard its accession to the General Act as covering or relating to any dispute arising out of any events occurring during the present crisis."³⁷ The Swiss Federal Council made a reservation, when informed of Australia's action, similar to that which it had made with reference to certain States' denunciation of the Optional Clause; the Netherlands Government also made such a reservation. By a letter of December 7, 1939, the Government of Canada took action with reference to the General Act paralleling that of Australia.

THE ELECTION OF JUDGES SCHEDULED FOR 1939

Under Article 13 of the Statute of the Court, the judges are elected for a term of nine years or for the unexpired portion of such a term, and the terms of all the judges expire simultaneously. Up to this time, eleven elections have been held. The first general election was held in 1921, and by-elections to fill vacancies were held in 1923, 1926, 1928, 1929, and 1930.³⁸ The second general election was held in 1930, and by-elections to fill vacancies were held in 1935, 1936, 1937, and 1938. With the second nine-year term expiring on December 31, 1939, a third general election was scheduled to be held by the Assembly and Council of the League of Nations plus representatives of certain other States, at their meetings in September, 1939.

³³ Series E, No. 15, p. 231.

³⁴ Document C. L. 30. 1939. V. ³⁵ Doc. C. L. 31. 1939. V. ³⁶ Doc. C. L. 61. 1939. V.

³⁷ League of Nations Official Journal, 1939, p. 412.

³⁸ See the writer's study of the elections, published in this JOURNAL, Vol. 24 (1930), pp. 718-727.

Preparations for a general election were begun on February 17, 1939, when the Secretary-General of the League of Nations addressed to members of national groups in the Permanent Court of Arbitration and other national groups as provided in paragraph 2 of Article 4 of the Court's Statute, invitations to nominate candidates in the election. It was requested that nominations be made by May 31, 1939, but under the practice previously established later nominations were not excluded.

In response to these invitations, fifty candidates were nominated by forty-six national groups;³⁹ three of the nominees later declined the candidacy. Twenty-nine of the fifty candidates were nominated each by only one group, and only twenty candidates received three or more nominations. Ten of the present fifteen judges of the Court were nominated and none of the ten declined the candidacy. Of the candidates not now judges of the Court, M. Politis (Greece) received seventeen nominations, but on August 7 he notified the Secretary-General that he could not accept to be a candidate; M. Leopoldo Melo (Argentina) received twelve nominations, M. Basdevant (France) eight, M. Munir Erteğün (Turkey) seven, M. Eduardo Suarez Aranzolo (Mexico) six, M. de Mello Franco (Brazil) and M. Milovan Zoricic (Yugoslavia) five, and Sir Saiyid Sultan Ahmed (India), M. Alejandro Alvarez (Chile) and M. Arturo Garcia Salazar (Peru) four nominations. Though the list of nominees included nationals of some forty States, some of the larger States—Germany, Japan, and the Soviet Union—were not among the States whose nationals were on the list. On September 7, 1939, the Egyptian Minister for Foreign Affairs, acting "in agreement with Turkey, Iran, and Iraq," addressed a letter to the Secretary-General of the League of Nations, calling attention to Article 9 of the Court's Statute and suggesting that in compliance with Article 9 the Court should "include a jurist representing Islamic civilization and Moslem law."⁴⁰

The Assembly was scheduled to meet in its twentieth ordinary session at Geneva on September 11. On September 4 the Secretary-General consulted the members of the League of Nations by telegraph as to a proposal by the Government of the United Kingdom that both the Assembly and the Council should be adjourned;⁴¹ on September 7, the Secretary-General notified the members that a majority had agreed to the proposed adjournment.⁴² On October 24, after consulting the President of the Assembly, the Secretary-General telegraphed to the members a proposal that the Assembly's session should open on December 4;⁴³ in their replies to this proposal, several members of the League of Nations stated that they considered the convocation of the Assembly under the circumstances to be inopportune. The Netherlands and Swedish Governments proposed the convocation of the Fourth Committee of the Ninth Assembly, the 1938 session of which had not been

³⁹ A list of the candidates nominated was published in Document A. 27. 1939. V.

⁴⁰ Document A. 30. 1939. V. ⁴¹ Doc. A. 1(a). 1939. ⁴² Doc. A. 1(c). 1939.

⁴³ Doc. A. 1(d). 1939.

closed; on November 11, 1939, the Secretary-General consulted the members of the League as to this new proposal,⁴⁴ and on November 18 he informed them by telegram that as a majority had accepted it, the Fourth Committee of the Nineteenth Assembly would meet on December 4.⁴⁵ The Fourth Committee assembled on that date; meanwhile, however, on an appeal by Finland, the Secretary-General had acted under Article 11 of the Covenant and summoned a meeting of the Council for December 9, and the Twentieth Assembly had been convoked for December 11. Forty-three members of the League of Nations were represented in the Twentieth Assembly, which decided on December 11, on the proposal of its General Committee, "not to proceed during the present session with the renewal of the membership" of the Court, but to regard the election as "postponed to another session."⁴⁶

In these circumstances, the general election of judges was not held before the expiration of the nine-year term at the close of the year 1939. Hence, the provisions in Article 13 of the Court's Statute that the members of the Court "shall continue to discharge their duties until their places have been filled"⁴⁷ became operative, with the result that the terms of the judges previously elected were automatically extended to cover the period which may elapse until an election can be held.

On November 30, 1939, the Court took a decision that in the event of the operation of Article 13 of the Statute, the principle of that article would be applicable so that the President and Vice-President and the members of the various chambers would continue to discharge the duties of their offices until their replacement.

REDUCTION OF JUDGES' SALARIES

In view of the approaching general election of judges and on account of the financial condition of the League of Nations, on May 12, 1939, the Supervisory Commission of the League of Nations drew the attention of the Council of the League of Nations to the importance of a fresh consideration of the problem of the salaries to be paid to the judges during the nine-year period to begin in 1940. On May 27, 1939, the Council requested the Supervisory Commission "to examine in all its aspects the question of the remuneration of judges . . . and to submit its report in time to enable the Council if necessary to propose to the Assembly new revised scales, which would in that event be adopted by the Assembly before the next election of judges."⁴⁸ On June 27, 1939, the Supervisory Commission made its report to the Council, suggesting that the Council propose to the Assembly of the League of Nations that the annual salaries of the judges of the Court be fixed for the coming nine-year period at 36,000 florins instead of 45,000 florins, and at the

⁴⁴ Document A. 1(e). 1939.

⁴⁵ Doc. A. 1(f). 1939.

⁴⁶ Journal of the Twentieth Assembly, No. 2, p. 6.

⁴⁷ The French version of this text is perhaps clearer: "Ils restent en fonction jusqu'à leur remplacement."

⁴⁸ League of Nations Official Journal, 1939, p. 272.

11967

same time that the Council propose an amendment of the regulations governing the pensions of judges which would set 12,000 florins instead of 15,000 florins as the maximum amount of pension payable to retired judges.⁴⁹ On November 24, 1939, the President of the Court addressed a letter to the Secretary-General of the League of Nations stating that in view of the possibility that the present judges might continue in office under Article 13 of the Statute, after December 31, 1939, he had consulted all the members of the Court and they had unanimously agreed to the "reduction of their salaries, allowances and indemnities as from January 1, 1940, to the scale contemplated by the Supervisory Commission for the judges to be elected."⁵⁰ The budget for 1940 is based upon the reduced scale.

FINANCES OF THE COURT

Stringent reductions of expenditure by all of the organizations served by the League of Nations budget were effected during the year, and the necessity for economy led to substantial reductions in the whole budget for 1940. The total budget of the League of Nations for 1939 amounted to 32,234,012 Swiss francs; the budget for 1940 as originally approved by the Supervisory Commission allowed for a possible expenditure of 29,437,544 Swiss francs, but after a meeting of the Commission in September the budget for 1940 was reduced to 21,615,484 Swiss francs. As finally voted by the Twentieth Assembly on December 14, 1939, the budget of the League of Nations allowed for a total expenditure in 1940 of 21,451,408 Swiss francs.

The budget of the Court for 1939 was 2,839,689 Swiss francs; the budget for 1940 originally approved by the Supervisory Commission provided for a possible expenditure of 2,975,686 Swiss francs, the increase being due to pensions payable to the judges and to the possible removal expenses of new judges. This was later reduced to 2,383,638 Swiss francs (993,182.33 florins), and that sum was voted by the Twentieth Assembly at its meeting in December.

THE PRESENT OUTLOOK OF THE COURT

In opening a public sitting of the Court on December 4, 1939, President Guerrero (El Salvador) referred to the current international situation and to the Court's rôle in it, in the following terms:

At a time when the members of the Court were absent from its seat owing to the judicial vacation provided for by our Rules, grave events unfortunately occurred in Europe which have to a greater or less degree disturbed all normal national and international activities.

The Court is powerless to arrest the course of these tragic events which it deeply deploras. Amidst the present confusion however there remain problems the settlement of which is the Court's task and the submission of which to the Court's jurisdiction depends only upon the will of States.

⁴⁹ Document C. 204. M. 139. 1939. X.

⁵⁰ Document A. 5(c). 1939. X.

Faithful to its mission, the Court intends to provide to the best of its ability for the administration of that international justice of which it is the custodian. Today's hearing is a proof of this.

The Court is however fully aware of the practical difficulties and special exigencies of the present situation. In this connection it would remind Governments of the numerous resources afforded them by its Statute and Rules, whether for the adaptation of the procedure to the special requirements of a particular case or to secure the prompt settlement of disputes.

Even before the full Court, Article 31 of the Rules permits any "particular modifications or additions proposed jointly by the parties and considered by the Court to be appropriate to the case and in the circumstances." This provision *inter alia* affords Governments the means to curtail if need be the time-limits in proceedings in so far as may be consistent with a sound administration of justice.

It should also be remembered that the organisation of the Court comprises a Chamber for Summary Procedure, consisting of five judges who will always include judges of the nationality of the parties; this Chamber is able promptly to render decisions fulfilling all the requirements of justice.

In the last resort, recourse to international justice depends on the will of the Governments and on their readiness to submit for legal decision all which can and should be preserved from the arbitrament of violence. As for the Court, it means to accomplish to the full the duties incumbent upon it; and it will not weaken in that resolve.

THE SABOTAGE CLAIMS AGAINST GERMANY

By L. H. WOOLSEY

Associate Counsel on Behalf of Certain of the Claimants

On October 30, 1939, a series of 153 awards in the so-called Sabotage Claims against Germany was handed down by the Mixed Claims Commission under the Agreement of August 10, 1922, between the United States and Germany.* These awards were made pursuant to the decision of the Commission rendered on June 15, 1939, and the order entered the same day,¹ which held that German sabotage agents in this country were responsible for the destruction of the Black Tom Terminal on the night of July 29, 1916, and the Kingsland Plant on January 11, 1917, and that Germany was liable for the damages resulting from these destructions. After the pleadings had been filed in 1927-1928, together with considerable evidence, and after the argument in Washington in April, 1929, and the reargument at The Hague in September, 1930,² the Commission withdrew to Hamburg and rendered a decision dated October 16, 1930,³ dismissing all of the claims as not involving German responsibility. The Commission, however, found that the German Government had authorized a general campaign of sabotage in the United States during the period of neutrality and had sent men to this country for that purpose. The efforts of the American Agent⁴ in opposition to the German Agent to obtain a reconsideration of this decision resulted in several decisions of interest to the science of international law. The limited space permits only a summary discussion of the main questions.

REVISION ON THE GROUND OF MISAPPREHENSION OF THE FACTS AND THE LAW

Convinced that the decision of 1930 was not an adequate disposition of the cases as presented by the evidence, the American Agent in January, 1931, filed separate petitions⁵ for a rehearing upon the ground that the Commission had committed errors in its findings of fact on the evidence submitted, its failure to apply established principles of law in arriving at its decision, and

* For a summary of the proceedings since 1927, see this JOURNAL, Vol. 33 (1939), p. 737.

¹ The Commission was without a German member after March 1, 1939, when he retired.

² The reargument was due to further evidence filed under order of the Commission and also to the death of Umpire Parker.

³ The decision was rendered by the Umpire and the two national Commissioners, the Umpire and each Commissioner signing the decision. Decisions and Opinions, p. 994; also this JOURNAL, Vol. 25 (1931), p. 147.

⁴ The American Agent throughout was Robert W. Bonyngue and the Assistant Agent and Counsel was Harold H. Martin, who became the Acting Agent upon the death of Mr. Bonyngue.

⁵ Petitions of Jan. 12 and 22, 1931. In the early proceedings, the Black Tom case and the Kingsland case were kept separate, but later they were joined and treated together.

in allowing the Umpire to participate in the deliberations of the national Commissioners and to join in their decision.

The American Agent contended, *inter alia*, that the Commission had not given due weight to the proof, or had misapprehended its significance, particularly as to the incendiary origin of the destructive fires, and that the Commission had disregarded the well-known rules of law that a *prima facie* case should prevail and that an adverse presumption should be drawn from the refusal of Germany to produce documents or from the destruction of documents as compromising.⁶ Some of the documents requested from Germany were admitted to be in the possession of the German Agent, who refused to produce them, and many of the other documents, including the reports and the accounts of German Agents in the United States, had been destroyed as compromising. It is true, the American Agent said, that they had been destroyed prior to demand, but they were destroyed in anticipation of just such an investigation.⁷

The German Agent opposed these contentions. He said it followed from the agreement of 1922 that

Neither of the two Governments is entitled to a reopening of the cases decided by the Commission as a matter of right. It is left entirely to the Commission whether and under what conditions it may choose to proceed to the reconsideration of a case once decided.⁸

Relying on the same case of Philadelphia-Girard National Bank,⁹ he contended that any error in fact or law as a basis for revision must be manifest or obvious and that such an error had not occurred in the Commission's decision. He argued that the American Agent thus sought to escape the burden of establishing that the destructions were accomplished by German agents. He pointed out that the 1930 decision said "that the Commission does not need direct proof" but must be "reasonably convinced that the fires occurred in some way through the acts of said German Agents." Therefore, he said, the American Agent's position was simply the result of his failure to convince the Commission.⁸

The Commission's unanimous decision of March 30, 1931, on these petitions declined to take the views urged by the American Agent as to the facts and the law. Although the rules of the Commission, it said, made no pro-

⁶ The American Agent relied on the Commission's decision in the Philadelphia-Girard National Bank case (Decisions and Opinions, p. 939), and on two decisions of the General Claims Commission, United States and Mexico, 1923, in the W. A. Parker claim (Opinions, p. 35; this JOURNAL, Vol. 21, 1927, p. 174) and the G. W. Cook claim (Opinions, p. 311; this JOURNAL, Vol. 22, 1928, p. 185). The latter case referred to the Parker decision and also to the decision of the French-Venezuelan Commission of 1902 in the Jules Brun claim (Ralston's Report, p. 25).

⁷ United States briefs on petitions of Jan. 12 and 22, 1931.

⁸ Decisions and Opinions, p. 939. This decision was rendered by the two national Commissioners without the concurrence of the Umpire.

⁹ Memorandum reply briefs of the German Agent, dated Jan. 15 and Feb. 3, 1931.

vision "for a rehearing in any case in which a final decree has been entered," these petitions had been carefully considered. It unanimously maintained the doctrines of its previous decisions that the

Treaty [of Berlin] requires affirmative proof that such damages were the result of the Imperial German Government or its agents. The previous decisions of the Commission invariably have been based on this requirement. In the instant case our conclusions were that the evidence did not convince us that the damages were the result of such acts.¹⁰

And it found nothing to change the conclusions reached in the Hamburg decision.

Thus the Commission declined to accept the legal rules of a *prima facie* case or of a presumption from a refusal or destruction of documents, basing its requirement of affirmative proof on the Treaty of Berlin. There is nothing in that treaty or in the claims agreement thereunder which defines the *method* of arriving at the liability of Germany through acts of its Government or its agents. The only statement bearing on this point is in the Peace Resolution of Congress of July 2, 1921, which is recited in the preamble of the treaty and which is adopted in Article I. This resolution refers to the satisfaction of all claims of Americans "who have suffered through the acts of the Imperial German Government or its agents."¹¹

The rule laid down by the United States-Mexican Claims Commission in the Parker case, above cited, was that when the claimant has established a *prima facie* case, the respondent may not insist upon proof "beyond a reasonable doubt without pointing out some reason for doubting." While this opinion denied the existence in international procedure of rules as to burden of proof borrowed from municipal procedure, yet it supported the weight of international practice that the primary burden rests on each party to prove his assertions.¹² It also held that the failure to produce evidence peculiarly within a party's knowledge, unexplained, may be taken into account by the Commission.¹³ The instant decision, however, as well as the decision of 1930, applied the rule of "convincing" the tribunal.

WAS THE COMMISSION A THREE-MAN COMMISSION?

The petitions of January, 1931, also contended, as stated above, that the decision of 1930 had been irregularly rendered in that the Umpire should not

¹⁰ Decisions and Opinions, pp. 995-996. In his decision of Dec. 3, 1932, in these cases Umpire Roberts said "this tribunal . . . is still bound to act only upon proof which reasonably leads to the conclusions upon which liability is consequent." *Id.*, p. 1028; this JOURNAL, Vol. 27 (1933), p. 345 at 364.

¹¹ Certain parts of the Treaty of Versailles were also incorporated in the Treaty of Berlin, but they seem to add nothing to this phrase.

¹² See Sandifer, Evidence Before International Tribunals, p. 97.

¹³ In the Brun case, *supra*, the Umpire referred to "the presumption which arises when one is in possession of important truths essential to a judicial inquiry and elects not to produce them."

have participated in the decision unless the National Commissioners had disagreed and certified their disagreement to him. It was pointed out that the Agreement of 1922 provided in Article II for two national Commissioners and "an Umpire to decide upon any cases concerning which the Commissioners may disagree or upon any points of difference that may arise in the course of their proceedings."¹⁴

The American Agent argued that the Commission and Umpire acting together deprived the Umpire of the benefit of the independent opinions of the national Commissioners and deprived the United States of the right to a rehearing before the Umpire or the presentation of further evidence should he desire either.¹⁵

The German Agent opposed these contentions. He contended that the Umpire had the function of deciding any "points of difference" between the national Commissioners which required the coöperation among all members of the tribunal. He also pointed out that the rules of the Commission provided that the decisions of the Commission may be signed by all three members, by the two national Commissioners should they be in agreement, or by the Umpire alone in case they certified their disagreement. In several thousand claims, he said, awards had been signed by the Umpire and the two Commissioners and had been arrived at in joint deliberations without a word of criticism from the American Agent.¹⁶ He generalized:

From the beginning to the present day the Commission has practically functioned as a single body with the Umpire acting as its third member, casting the deciding vote in the event of disagreement or of differences between the National Commissioners.¹⁷

The American Agent in his counter-brief pointed out that the many decisions in which all three members of the tribunal joined were in a group of cases in which the general principles had been laid down in administrative decisions and that there were many other cases in which the Umpire had rendered decisions upon certificates of disagreement and had called for additional evidence.¹⁸

In its opinion of March 30, 1931, dismissing the two petitions of January, 1931, the Commission decided with respect to the alleged irregularity in procedure:

This question is raised by the American Agent's claim that the decision was irregularly rendered because the Umpire participated in the de-

¹⁴ Art. VI of the agreement also provided: "The decision of the Commission and those of the Umpire (in case there may be any) shall be accepted as final and binding upon the two Governments."

¹⁵ United States briefs on petitions of Jan. 12 and 22, 1931.

¹⁶ Memorandum reply briefs of the German Agent, filed Jan. 16, and Feb. 5, 1931.

¹⁷ German brief filed Jan. 16, 1931, p. 17.

¹⁸ Brief of American Agent in reply to the memorandum reply brief of the German Agent, filed Jan. 16, 1931.

liberations of the national Commissioners and in the opinion of the Commission. The Umpire participated in the deliberations of the Commissioners and in the opinion in accordance with the usual practice of the Commission in cases of importance since its foundation in 1922, a practice never before questioned and not in our judgment of doubtful validity even if it had not so long been accepted by all concerned.¹⁹

REVISION ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

At the time of handing down the decision of March 30, 1931, the Commission reserved the question of reopening on the ground of newly discovered evidence, and suggested that the two Agents submit briefs discussing "the jurisdictional considerations and legal principles" as to the admission of new evidence and what kind of new evidence, if any, should be admitted—regardless of the decision in the Philadelphia-Girard National Bank case.²⁰ The question was whether the Commission by virtue of its decision of 1930 had become *functus officio* in respect of the Sabotage cases. In his brief the German Agent took the position that the Commission was a temporary tribunal established only to determine Germany's financial obligations to the United States; that the jurisdictional powers of the Commission must be found in the Agreement of 1922 and "no other jurisdictional considerations or legal principles can apply"; that the Commission was without jurisdiction to reopen any case in which the evidence had been closed, the case submitted for "final determination" and a "final decision" rendered; and that, therefore, the Commission had no authority to admit further evidence or to grant

¹⁹ Decisions and Opinions, p. 996. The petitions of Jan. 1931, also requested the Commission to issue subpoenas requiring certain persons in the United States under the Act of July 3, 1930, to testify before the Commission. This law required formal action on the part of the Commission as an official body. On this point the Commission held that the power to issue subpoenas given under this Act could not be exercised by the Commission under the terms of the Claims Agreement of Aug. 10, 1922, and such additional powers could not be conferred by a later statute of the United States. (Decisions and Opinions, pp. 996-997.) On Feb. 5, 1932, the American Agent filed a motion requesting either the production of certain witnesses for oral examination before the Commission or the issuance of subpoenas for such examination, which again raised the question of the power of the Commission to issue subpoenas. This motion was opposed by the German Agent. Thereupon the Commission suggested that the question be referred to the two Governments for settlement. The German Government refused to consent and no further agreement was reached. (Decisions and Opinions, p. 1001.) In his petition of May 4, 1933, the American Agent insisted that the Commission should act by subpoena or otherwise so as to obtain evidence from certain witnesses within the United States. This difficulty was finally overcome by the Act of June 7, 1933 (amending the Act of July 3, 1930), which provided for the issuance of subpoenas upon application by the American Agent to the Federal courts without formal action by the Commission. This was similar to the provision of the German ordinance of June 8, 1923, permitting the German Agent or other officials connected with the Commission to institute proceedings in the German courts to compel the production in Germany of evidence concerning matters before the Commission. Eventually the Commission itself did in June, 1937, issue subpoenas for and hear a number of witnesses in July, 1937.

²⁰ Decision of Umpire Roberts, Dec. 15, 1933; Report of Robert W. Bonyne, 1934, p. 195; *infra*, p. 154.

a hearing on the basis of it.²¹ The American Agent, on the other hand, in his brief contended that the Commission was not *functus officio* as to any particular claim until it had determined the global amount to be paid by Germany in satisfaction of her financial obligations to the United States under the Treaty of Peace, citing the opinion in the Lusitania Cases.²² He argued that the Commission retained jurisdiction to rehear cases after adjudications made and awards entered, citing the Schreck case²³ and the Moore case²⁴ under the somewhat differently worded Convention of 1868 between the United States and Mexico, several cases before this commission in which "substantial changes, alterations, and modifications of awards" had been made, and the practice of the Mixed Arbitral Tribunals under the Treaty of Versailles, Art. 304 (g). He added that the kind of new evidence justifying the opening of a decree must be such that "if known at the time the decree was originally entered would have resulted in a change of the decision."²⁵ There being no motion on this question before the Commission, the American Agent filed a petition on May 27, 1931, requesting a decision on the jurisdictional question of the power of the Commission to reopen a decision on the ground of newly discovered evidence. However, no formal ruling on this motion was made by the Commission.²⁶ Meanwhile, important new evidence tending to implicate Germany in these disasters was being collected by the American Agent and filed with the Commission. Some of this evidence was filed with a "supplemental petition" of June 30, 1931 (filed July 1), asking the Commission to reopen and reconsider its decision of 1930 on the newly discovered evidence and upon such additional evidence as may be adduced by either side.²⁷

After the argument at the close of July, 1931, Umpire Boyden died, and a reargument took place in the latter part of November, 1932, before the Commissioners and Umpire Roberts. At the beginning of this argument the American Agent raised a question as to the attitude of Germany. He said:

I am not sure what the attitude of Germany may be in reference to the jurisdictional question. I am not certain whether it is the attitude of Germany that it will not submit to this Commission jurisdictional questions for its consideration and determination. If that be the attitude of Germany, I think we should know it at the very beginning. . . . If Germany were to take the attitude that the decision of the Commission would not be binding on Germany, it means that Germany is simply submitting its evidence and considering these cases at the present time, but reserving to the end the position which the German Agent an-

²¹ German brief filed April 27, 1931.

²² Decisions and Opinions, p. 17.

²³ Moore, Arb., 1357, 2186.

²⁴ *Id.*, 1357.

²⁵ American brief filed April 27, 1931.

²⁶ The question was covered in the Commission's decision of Dec. 15, 1933, referred to hereafter.

²⁷ On July 28, 1931, the Commission ordered the Joint Secretaries to "receive provisionally" the evidence offered, "but reserves for later decision the question of its right to admit new evidence and all other questions arising in connection with the aforesaid petition if the evidence be admitted."

nounced as the position of Germany, that this Commission has no jurisdiction or power to consider the question as to the right to reopen the case.²⁸

In order to determine Germany's attitude with reference to the power of the Commission to pass upon this jurisdictional question, the Umpire stated to the German Agent: "I did not understand him [German Agent] to take the position that the Commission could not consider the question of its own jurisdiction."

The German Agent: "The understanding of the Commission is entirely correct."

The Umpire: "In other words that is a justiciable question here."

The German Agent: "Yes."²⁹

The national Commissioners certified their disagreement to the Umpire on all questions involved in the supplemental petition of June 30, 1931, except that the German Commission reserved "the question of the jurisdiction of the Commission to reexamine any case after a final decision has been rendered is not a proper question to be certified to the Umpire on disagreement of the national Commissioners."³⁰

On December 3, 1932, the Umpire, Mr. Justice Roberts, handed down the decision of the Commission dismissing the supplemental petition on the ground that the new evidence submitted was not, as a matter of fact, sufficient to reverse or materially modify the decision of 1930.³¹ The question of the jurisdiction of the Commission to reopen the cases on the ground of newly discovered evidence was not decided, although he noted the German Commissioner's position that "while the two Commissioners by mutual agreement may reopen in such a situation, they may not do so where, as here, one of the Commissioners opposes the reopening."³²

From this point the question of reopening on the ground of new evidence merged into the question of reopening on the ground of fraud in the evidence, and was considered in the decision of December 15, 1933, referred to here-

²⁸ Oral Argument, Washington, November, 1932, p. 243; Report of American Commissioner, 1933, pp. 57-58.

²⁹ Oral Argument, Washington, November, 1932, p. 244; Report of American Commissioner, 1933, pp. 46-47. In his additional opinion of Nov. 22, 1933, the German Commissioner indicated that the idea that the Commission must deny a petition for reopening if one Government opposed it was "in the mind of the German Agent when answering the Umpire's question in the last Washington argument." (Report of American Commissioner, 1933, p. 53.) For comments of the American Commissioner on this statement, see *id.*, pp. 56, 61.

³⁰ Decisions and Opinions, p. 1004.

³¹ *Ibid.*

³² Decisions and Opinions, pp. 1004, 1028; this JOURNAL, Vol. 27 (1933), p. 345. In his decision of Dec. 15, 1933, the Umpire appears to disagree with this view, saying "a case once decided can only be reopened by a formal agreement of the two Governments," not by their Agents. Neither did the Umpire discuss whether any of the evidence offered fell in the class of after-discovered evidence. The decision of Dec. 3, 1932, was unanimously set aside in the Commission's decision of June 3, 1936. "This decision reinstates the cases into the position they were before the Washington decision [of 1932] was given."

after. In that decision the Umpire, without examining the new evidence so far filed, held that in the circumstances of this case the Commission had no power to reopen the 1930 decision on the ground of presentation of after-discovered evidence, although it had the power to reopen and correct a decision "to accord with the facts and the applicable legal rules." The argument of the decision appears to be that the Agreement of 1922 contained no provision for closing proofs, but, on the contrary, provided that the Commission shall receive and consider "all written statements or documents which may be presented to it" by either Government. It has never entered an order for the final closing of the record in any case without consent or over objection. The American Agent voluntarily closed his record and submitted his case at The Hague, although he was under no obligation to do so if he knew or had reason to expect that further evidence was obtainable. The agreement does not contemplate that when the two Agents signify their readiness to submit a case and do submit it upon the record as then made to their satisfaction, the Commission shall have power to permit either Agent to add evidence to the record and to reconsider the case upon a new record thus made. The Umpire indicated that the situation might have been different if the Commission had power, as in municipal procedure, to make an order to close the proof and to compel the parties to proceed even though either party might not then be ready.

REOPENING ON THE GROUND OF FRAUD

The continued investigations of the United States Agent and of the claimants uncovered convincing evidence that both destructions were in fact due to the activities of German agents under instructions of the German Government itself.³³ Owing to the indications in the record of the spuriousness of certain parts of the German evidence, the American Agent finally filed a petition, dated May 4, 1933, for a rehearing of the case on the ground that fraud, collusion and suppression in the German evidence had misled the Commission in the Hamburg and Washington decisions.³⁴ The Agents filed no briefs on the jurisdictional question raised by this petition but relied on their briefs on the reopening of awards filed under the Commission's request of March 30, 1931, above mentioned. The disagreement of the German Commissioner with the proposition to reopen the Sabotage cases "under any circumstances or for any reason"³⁵ led to a note from the German Ambassador to the Department of State, dated October 11, 1933, repeating the view expressed in prior communications to the State Department that:

The German Government considers the petitions for rehearing [of the Sabotage cases] in conflict with existing treaty provisions, as contained in paragraph 3, Art. VI of the Agreement of August 10, 1922, between the United States and Germany. The German Government regards

³³ Considerable evidence was also taken in court under the Act of June 7, 1933.

³⁴ The Commission also heard witnesses on the question of collusion in July, 1937.

³⁵ Decision of Dec. 3, 1932.

the Commission as being without authority to pass upon a difference of opinion which may exist between the two Governments in this connection.³⁵

On October 19, 1933, the Under Secretary of State transmitted this note to the American Agent, Mr. Bonyng, stating:

It is the view of the Department that the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself. It is understood that the American and German Commissioners hold divergent views on this question and that in a normal course of procedure, under the claims agreement and the rules of procedure adopted by the Commission, the matter would be submitted to the Umpire for decision.³⁶

The disagreement of the national Commissioners³⁷ as to the power of the Commission to entertain the pending petition after the Hamburg decision had been rendered, was certified to the Umpire by the American Commissioner alone on October 31, 1933, in the absence in Europe of the German Commissioner, Dr. Kiesselbach. The written opinions of the national Commissioners were appended to the certificate.³⁸ Dr. Kiesselbach contended that the Commission had no inherent power to reopen a case but the power must be conferred on it by the parties, and this they had not done in the Agreement of 1922. He stated that the Philadelphia-Girard National Bank case showed that the Commission never had the intention to apply a rule of reopening to its procedure. That even if the practice be changed, it could not be applied retroactively to a decision already made final and binding. His opinion, however, dealt chiefly with the question of reopening on the

³⁵ Minutes, p. 1599.

³⁶ Minutes, p. 1600. The Secretary of State in a letter to the Secretary of the Treasury, dated Feb. 16, 1933, stated: "In my opinion, it is solely within the competency of the Commission to decide as to the reopening of cases which have been heard and adjudicated by it." (Report of American Commissioner, 1933, p. 49.)

At the meeting of the Commission on Dec. 31, 1933, the American Commissioner stated that he regarded the difference of opinion which existed between the two Governments as a proper one to be decided by the Commission, and that the attitude of the German Government was an attempt to determine the question independently of the Commission and on political or other considerations.

³⁷ Their disagreement had previously been stated by the Umpire in his decision of Dec. 3, 1932, in which Dr. Kiesselbach concurred.

³⁸ The opinions of the German Commissioner of May 6, 1933, and of the American Commissioner of June 21, 1933, are printed in the Report of the American Commissioner, 1933, p. 29 *et seq.* The German Commissioner submitted an additional opinion Nov. 22, 1933 (*id.*, p. 52), and the American Commissioner submitted a supplemental opinion Nov. 27, 1933 (*id.*, p. 55). In his additional opinion the German Commissioner said: "If nevertheless a petition for rehearing is filed the Commission is bound to pass upon it, but to deny it if and as far as one Government opposes it."

At the time the German Commissioner filed his original opinion he wrote a letter of May 5, 1933, to the American Commissioner stating that he was under instructions from his Government "to bring now the question whether or not our Commission has the right to reopen, to a

final decision." (*Id.*, p. 55; Minutes, Oct. 31, 1933.) In an exchange of notes between Ambassador Luther and the Secretary of State dated May 7, 1934, it was agreed "that the Commission shall not be asked in the future to consider new cases or cases already decided other than the Sabotage cases, and the case of Mrs. Catherine McNider Drier." (Minutes, May 7, 1934.)

ground of new evidence and did not mention the quite different question of reopening on the ground of fraud.

The American Commissioner believed that since the agreement establishing the Commission contained no controlling provision on the question, the Commission had inherent power to determine its jurisdiction to entertain petitions for rehearing; that there was nothing to the contrary in the attitude and record of the Commission up to that time; that the Commission was left free in the exercise of its judicial powers in order to carry out the duties assigned to it; that the stipulation as to the finality of its decisions applied only to decisions which it regarded as no longer subject to revision or further action; and that, therefore, the Commission had in general the right in its discretion to reconsider a decision rendered by it.

The Umpire accepted the fact of disagreement as sufficiently shown, and under date of December 15, 1933, handed down his momentous decision on the right to reopen the Sabotage cases. In a comprehensive opinion the Umpire decided several questions relating to the reopening and reconsideration of a prior decision. He did not examine the new evidence which had been filed, but considered each question on principle. He indicated that the reverse practice of reserving the principle and considering the evidence was confusing. The first question was whether the Umpire could decide a question of disagreement between the National Commissioners in the absence of a joint certificate of disagreement. As to this he held:

Under the Agreement no formal act is required to bring into operation the authority thus vested in the Umpire. Rule VIII(a), entered February 14, 1924 (amending that rule as originally enacted on November 15, 1922), reads: "The two national Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified." But rules adopted by the Commission as a matter of its own convenience and for the guidance of the national Agents cannot contravene the explicit terms of the instrument which created the Commission.³⁹

The second question was whether the Commission had power to pass upon the extent of its own jurisdiction. The Umpire held:

If that body may not from the terms of the agreement ascertain what power was conferred, it would be wholly incompetent to act except in

³⁹ The entire decision is printed in the Report of the American Commissioner, Dec. 30, 1933, p. 63; also in this JOURNAL, *infra*, p. 154.

an advisory capacity, and none of its decisions could in the nature of the case be accepted as final and binding by the Governments, as the Agreement states they shall be. How the Commission shall proceed with its task, the form of pleading to be adopted, the manner of hearing (subject to what is hereafter stated in respect of Article VI), the form and entry of its decisions, its control over a case after a decision is rendered, are all left to its determination and regulation.

The agreement is to be read in the light of its language and its purpose; and where it is silent, the powers and duties of the Commission are to be determined according to the nature of the function entrusted to it. I have no doubt that the Commission is competent to determine its own jurisdiction by the interpretation of the agreement creating it. Any other view would lead to the most absurd results—results which obviously the two Governments did not intend.⁴⁰

The third question was whether the Commission had power to reopen a case after it had once been decided. On this question the Umpire said:

My view is that the Commission is a tribunal sitting continuously with all the attributes and functions of a continuing tribunal until its work shall have been closed; and that as such tribunal it is engaged in the trial and adjudication of a large number of separate and individual cases.

No provision of the claims agreement, he said, "purports to define what is or shall be considered a 'decision of the Commission'". It is left to the Commission to determine when its decision upon a claim is final."

The Umpire then addressed himself to the power of the Commission to reopen a case for the correction of a mistake of fact or law, and held that the Commission had power to consider the question of mistake and to act accordingly. As we have seen, he held that the Commission was without power to reopen for after-discovered evidence. Finally, the Umpire ruled that the Commission had full authority to reopen a case on the ground of fraud, collusion, and the suppression of evidence. He decided as follows:

The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

⁴⁰ Under Art. VII of the Jay Treaty of 1794 with Great Britain a controversy arose as to the power of the Commission to decide whether it possessed jurisdiction of claims which had been decided by the Lord Commissioners of Appeal. Lord Grenville submitted the question to Lord Chancellor Loughborough, who declared "that the doubt respecting the authority of the Commissioners to settle their own jurisdiction was absurd; and that they must necessarily decide upon cases being within or without their competency." (Moore, Int. Law Dig., Vol. VII, p. 33.)

I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand.

The significance of this decision in international law is that it is the first instance known to the writer in which a decision of an international tribunal obtained by fraud, collusion, and suppression of evidence by witnesses of one of the parties has been reopened and reheard by the tribunal itself. In this respect the decision is a helpful precedent and a step forward in the process of international arbitration. Theretofore the complaint of fraud had in most cases been acted on by the claimant government in the first place, certainly not by the commission which rendered the decision in the first instance.⁴¹

It may be pointed out, however, that in a number of claims other than the Sabotage claims the Commission has set aside earlier decisions dismissing a claim and has thereafter on agreed statements approved by both Agents recommending awards, entered awards in such claims without any question being raised on jurisdictional grounds.⁴² Other tribunals have also on a proper showing reconsidered their decisions.⁴³

Thus the petition of May 4, 1933, was upheld and the American charges of fraud, collusion and suppression of evidence were subjected to proof before the Commission. A great amount of additional evidence was obtained by both sides and filed with the Commission. This marked the turning-point in these claims. After an exchange of briefs and counter-briefs and a hearing in the spring of 1936, the Commission rendered a unanimous decision of June 3, 1936, setting aside the Commission's decision of June 3, 1932, in which it had been unable to make an affirmative finding from the evidence. Subsequently the Commission called for the production of further evidence, and certain witnesses were called before the Commission and examined by it.

⁴¹ Gardiner case, United States and Mexico (Moore, Arb., p. 1248); Weil and La Abra cases (Moore, Arb., p. 1329; 29 Ct. Cls. 521; 32 Ct. Cls. 529; 35 Ct. Cls. 53; 175 U. S. 423); Leggett claim (Moore, Arb., p. 1278); The Mannesmann claim against Morocco (I Fauchille, *Traité de Droit International Public*, Vol. I, Pt. 3 (1926), p. 567); Pelletier and Lazare claims against Haiti (Moore, Arb., pp. 1794-1800; U. S. For. Rel., 1887); The Gypsum Queen, Canadian Reparations Commission, 1932.

⁴² Harby Steamship Co. (Doc. 6288); Thomas S. Hamlin (Doc. 7676); Edward Nickerson (Doc. 7796); Wollenberger & Co. (Doc. 7978); Elizabeth Achelis *et al.* (Doc. 8094); Alexander Sprunt & Son (Docs. 8145-9); Lezcano & Co. (Doc. 13787); Paul Devantier (Doc. 15884); and other cases cited in American brief filed April 27, 1931.

⁴³ Young, Smith & Co. (Moore, Arb., p. 2184), de Acosta y Foster case (*id.*, p. 2187), Moore case (*id.*, p. 1357), Compton case (*id.*, p. 2188), Schreck case (*id.*, pp. 1357, 2186.)

The Weil claim (Moore, Arb., pp. 1309-1329) is sometimes cited as *contra*. But in that case the application of the Mexican Agent for rehearing was improperly submitted to the Umpire through the Secretary of State after the Commissioners had concluded their work

The remaining important questions which came before the Commission and were disposed of in its decisions of June 15,⁴⁴ and October 30, 1939, are the subject of litigation in the Federal courts between certain of the prior awardholders and the Sabotage awardholders, and it is deemed inopportune to discuss these questions at the present time. It is hoped that they may form the subject of a subsequent article in this JOURNAL.

and ceased to function. In the Schreck case the same Umpire, on a proper application to the Commission, and after a patient rehearing, reversed his former ruling and made an award in favor of the claimant.

⁴⁴ Printed in this JOURNAL, Supplement, Vol. 33 (1939), p. 770.

REVISION OF NATIONALITY LAWS OF THE UNITED STATES

BY RICHARD W. FLOURNOY

Professor of International Law, National University Law School

It is to be hoped that one of the first measures to which Congress will give its attention during the next session will be the bill (H. R. 6127). "To revise and codify the nationality laws of the United States into a comprehensive nationality code." This bill was introduced by the Honorable Samuel Dickstein, Chairman of the Committee on Immigration and Naturalization of the House of Representatives, May 3, 1939. It embodies a draft nationality code, which was prepared under the direction of a committee composed of the Secretary of State, the Attorney General and the Secretary of Labor, in pursuance of an Executive Order of April 25, 1933. The cabinet committee submitted its report June 1, 1938, upon the basis of extensive studies and conferences by officials of the three Departments, and the report was submitted to Congress with a message of the President dated June 13, 1938.*

The measure referred to should be of special interest to many persons in this country, including lawyers and students of political science, as well as individuals having a more direct personal interest, since it covers the whole field of nationality, that is, the acquisition of nationality at birth, under *jus soli* and *jus sanguinis*, and loss of nationality. It should hardly be necessary to emphasize the unusual importance of legislation of this kind, in view of the basic character of nationality laws and the fact that they determine the very material of which the state is composed. For this reason they are of vital interest to the state itself. Moreover, to the individuals who compose the national community they are of unusual importance, since they form the basis upon which various other incidental rights are erected.

As pointed out in Dr. James Brown Scott's recent very interesting work entitled "Law, The State and the International Community,"¹ in any state the people, that is, the citizenship body, forms the principal element, territory and government under law being secondary. Thus the nationality laws of any state necessarily reflect its political history and character.²

An outstanding example of the fact last mentioned may be found in the nationality laws adopted in Germany in recent years. In an article contributed to this JOURNAL for July, 1914, entitled "Observations on the New German Law of Nationality," the author, in discussing the German na-

* Copies of the printed report may be obtained from the Government Printing Office, Washington, D. C., price 20 cents.

¹ Columbia University Press, 1939, p. 23 *et seq.*

² One of the greatest champions of the right of peoples to govern themselves was Woodrow Wilson, and when he wrote his history, he gave it the title, "A History of the American People."

tionality law which went into effect January 1, 1914, called attention to certain significant changes, especially the provisions under which Germans who had lost their German nationality might easily recover it without the necessity of returning to Germany, and Germans obtaining naturalization thereafter in foreign countries might under certain conditions preserve their German nationality. In general, the object of these provisions was evidently to retain the allegiance of Germans throughout the world and to bring those who had lost German nationality under the old law back into the German fold.

The nationality legislation adopted in Germany in recent years is still more significant. Without attempting to enter into an extensive discussion of these laws, special mention may be made of the Baden Decree of August 4, 1933, in which it was provided that every petitioner for naturalization must show that both of his grandparents were of Aryan descent, and "if the petitioner descends from an alien and a German parent, the competent district physician has to examine which line of descent is predominant in the descendant." Under this provision naturalization would not be granted unless the German line should be found to be predominant. Mention may also be made of the German law of February 5, 1934, under which State citizenship was abolished, and it was declared that "there shall exist only one citizenship in Germany, direct central government citizenship—*Reichsangehörigkeit*"; the Reich citizenship law of September 15, 1935, Section 2 of which provided that "only a national of German or related blood who proves by his conduct that he is willing and fit to serve the German people and Reich faithfully is a Reich citizen"; the German Defense Law of May 21, 1935, concerning military obligations of Germans; the Decrees of April 26, 1937, concerning the drafting of persons liable for labor and military service; and the law of February 3, 1938, concerning the registration of Germans residing abroad.

Mention should also be made of the British Nationality Law of January 1, 1915. This important and significant legislation was discussed in an article by the present writer which appeared in this JOURNAL for October, 1915.³ As pointed out in that article, the new British law was not imposed by the Government of Great Britain upon the several Dominions, but was submitted for their individual adoption. In some instances the Dominions, in adopting it, made changes suitable to their various situations and conditions. This was an indication of the changing character of the British Empire, and its development into a Commonwealth of Nations. It was also a recognition of the natural right of peoples living in various quarters of the globe and under various conditions, who have demonstrated their ability to govern themselves, to make their own laws according to their own peculiar needs.

To return to the history of our own country, it is a significant fact that the

³ Vol. 9 (1915), pp. 870-882.

great documents which formed the foundation of the United States emphasized the fact that the new state was being created for the benefit of the people. Reference is made not only to the Declaration of Independence and the Constitution, but to the Mayflower Compact of November 11, 1620, and the Virginia Bill of Rights of June 12, 1776. The signers of the Compact solemnly agreed that they would "combine . . . together into a civil body politick, for (their) better Ordering and Preservation, and Furtherance of the Ends aforesaid." In the Virginia Bill of Rights it was declared "that all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."

The meaning of nationality, especially in the United States, was aptly stated by Chief Justice Waite, in rendering the opinion of the Supreme Court of the United States in *Minor v. Happersett* (1875).⁴ He defined the word "citizen" as a "member of a nation," and in this regard said:

There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.

At a recent dinner given in his honor by the Smithsonian Institution and certain other scientific societies, Dr. Julian S. Huxley, the British biologist, and grandson of Thomas Henry Huxley, discussed the theory, which seems to have been advanced by advocates of the Nazi and Fascist systems, that the relationship of a citizen to the state to which he belongs is similar to the relationship of a cell to the human body. He gave certain scientific reasons for concluding that this theory is a fallacy. To the average person, having little knowledge of the science of biology, the theory in question appears fallacious on its face, since there is obviously no reason for the existence of the state except the well-being of the people, or at least a portion thereof;

⁴21 Wallace 162.

whereas there is no apparent reason for the existence of cells except as portions of larger bodies. Needless to say, in the United States the state has been created for the good of the whole body of the people, rather than a portion thereof. Therefore, in the formulation of the laws of nationality, which determine the composition of the nation, the good of the people as a whole should be the first consideration.

In the Declaration of Independence, one of the complaints brought against the British sovereign was that he had "endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands." This does not mean, however, that the inhabitants of the colonies were in favor of throwing the gates wide open for the indiscriminate admission of aliens. This whole subject was discussed at considerable length in the First Congress, in February, 1790, with regard to a proposed naturalization measure.⁵ It was proposed to make naturalization very easy, without requiring any prior period of residence in the United States. However, this measure was strongly opposed by various members, including Mr. Madison of Virginia, Mr. Sedgwick of Massachusetts, and Messrs. Smith, Jackson and Burke of South Carolina, all of whom made strong arguments in favor of placing restrictions upon immigration and naturalization, for the good of the country.

Mr. Madison, while observing that it was "very desirable that we should hold out as many inducements as possible for the worthy part of mankind to come and settle amongst us, and throw their fortunes into a common lot with ours," contended that naturalization should be granted only to persons intending in good faith to reside in this country permanently and cast in their lot with the United States. He argued that, if the laws should be too lax, "aliens might acquire the right of citizenship, and return to the country from which they came, and evade the laws intended to encourage the commerce and industry of the real citizens and inhabitants of America, enjoying at the same time all the advantages of citizens and aliens."

Mr. Sedgwick, in advocating restrictive legislation, argued that Congress should "use their discretion, and admit none but reputable and worthy characters; such only were fit for the society into which they were blended."

Mr. Burke was in favor of selective immigration and special measures for the encouragement of farmers, mechanics, and manufacturers. He opposed the admission of persons of the mercantile class "who come with a view of remaining so long as will enable them to acquire a fortune, and then they will leave the country, and carry off all their property with them. These people injure us more than they do us good, and, except in this last sentiment, I can compare them to nothing but leeches. They stick to us until they get their fill of our best blood, and then they fall off and leave us."

The views just mentioned were based upon the theory that the people

⁵ 1 Annals, 1st Cong., 1109-1117.

who had settled and developed the States were naturally entitled to determine through appropriate legislation what classes of aliens should be received into the body of citizenship. Their proposals were to a very considerable extent adopted after the lapse of many years, that is, when Congress passed the admirable Immigration Act of 1924. In the meantime, the restrictions upon naturalization had been gradually increased, with a view to preventing abuse of the high privilege of citizenship.

It is impossible within the scope of this article to give a comprehensive account of the development of nationality legislation. Mention may be made in passing, however, of the Act of Congress of July 27, 1868,⁶ declaring the doctrine of the "right of expatriation" to be "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness," and the obligation of this Government to extend its protection to "naturalized citizens of the United States, while in foreign countries";⁷ the conclusion of the Bancroft treaties of naturalization with the various German States in the year 1868;⁸ the action of President Grant in obtaining reports on citizenship problems from the various members of his cabinet in the year 1873;⁹ the creation, pursuant to a Joint Resolution of Congress of April 13, 1906,¹⁰ of a Citizenship Board, composed of Dr. James Brown Scott, Dr. David J. Hill, and Mr. Gaillard Hunt, to study and report concerning questions relating to citizenship, expatriation, and the protection of American citizens abroad; and the passage by Congress of the Expatriation Act of March 2, 1907, largely as a result of the Board's report of December 15, 1906.¹¹

Prior to the passage of the act last mentioned, Congress had passed the Naturalization Act of June 29, 1906.¹² In addition to various improvements over the old laws governing naturalization, mainly administrative and procedural, this Act contained, in Section 15, a provision for the cancellation of the naturalization of persons who should have established a permanent residence abroad within five years after obtaining naturalization, upon the presumption that citizenship had not been obtained in good faith. This was a logical and very salutary measure. The prophesies made in the First Congress in the discussion mentioned above had come true, and large numbers of persons had procured naturalization merely for what they could get out of it, and had afterwards established themselves abroad, usually in their native lands, and embarrassed our Government by appeals for protection. Meantime, immigration had vastly increased, until in some years about a million aliens were entering the United States annually.

The Act of March 2, 1907, contained some useful provisions, especially those of the second section, still in effect, under which continuous residence

⁶ 15 Stat. 223.

⁸ Malloy, *Treaties, Conventions, etc.*

¹⁰ S. Res. No. 30, 59th Cong., 1st sess.

⁷ Revised Statutes, Secs. 1999-2001.

⁹ For. Rel., 1873, Vol. 2, p. 1186 *et seq.*

¹¹ H. Doc. No. 326, 59th Cong., 2d sess.

¹² 34 Stat. 596.

by a naturalized citizen of two years in the foreign state from which he came or of five years in any other foreign state, raised a presumption that he had ceased to be a citizen. It has been well established by decisions of the courts¹² that this presumption meant not an actual loss of citizenship, but merely a loss of the right to the protection of this Government abroad in cases in which the cause of the foreign residence was such that the presumption could not be overcome under the rules prescribed by the Department of State. Even with this limitation, the provision has been very useful in furnishing the Department of State with definite rules for determining when protection should be denied. However, the anomalous fact remains that children born abroad to persons presumed to have lost citizenship acquire citizenship of the United States at birth, and have a right at any time to enter and reside in this country as full-fledged citizens.

The next important citizenship measure was the Cable Act of September 22, 1922, which, with its various amendments, has had the effect of giving married women an independent status and equality with men as regards citizenship.

Finally, special mention should be made of the Act of May 24, 1934, and in particular the provision of the first section, amending the provision of Section 1993 of the Revised Statutes concerning the acquisition of citizenship by children born abroad to American fathers. Under this new provision, which was designed to carry out the rule of equality between men and women, citizenship may be acquired at birth by a child born abroad to an American woman married to an alien man, as well as by one born abroad to an American man married to an alien woman. It is true that this provision contains a limitation that, in such cases, "citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization." This somewhat ambiguously phrased statement appears to mean that the child does not acquire citizenship until he has fulfilled the two conditions just mentioned. However, this statute (as has been the case with a number of other nationality statutes) has been construed to mean something quite different from what it appears on its face to mean. Attorney General Cummings, in an opinion of July 21, 1934, the reasoning of which seems sound, concluded that the true meaning of the statute is that the child acquires citizenship at birth, but such citizenship is subject to defeasance upon failure to perform either of the conditions mentioned.

Section 5 of the Act of May 24, 1934, contains a provision under which a foreign-born child does not acquire citizenship through the naturalization of a parent until such child has resided in the United States five years. This

¹² *Camardo v. Tillinghast*, 29 F. (2d) 527, and cases cited.

provision is an amendment of Section 5 of the Act of March 2, 1907, but the Act of 1934 does not repeal the old provision of Section 2172 of the Revised Statutes (taken from an Act of April 14, 1802) concerning the naturalization of minors through the naturalization of their parents. The statute last mentioned is regarded as still in effect and applicable to a child who, at the time of a parent's naturalization, has no alien parent. The whole subject, however, in view of certain decisions of courts construing Section 5 of the Act of March 2, 1907, is somewhat confusing.¹⁴

No doubt the principle of equality between men and women with regard to nationality has come to stay. This does not mean, however, that all of the statutes embodying this principle should remain unchanged. Some of them result in great confusion and the lavish and indiscriminate conferring of citizenship upon large numbers of persons born in foreign countries who have no real connections with the United States, possess no American characteristics or sympathies and contribute nothing whatsoever to this country. Take the case, for example, of a person, male or female, born in the United States of unnaturalized Italian parents and taken in early childhood to Italy, where he or she grows up and is educated among other Italian children. Such child has Italian as well as American nationality, but is in all essentials Italian rather than American. Nevertheless, he or she may marry another Italian and the children born of this union in Italy will acquire citizenship of the United States at birth. This is not an imaginary example. There are thousands of such persons residing in foreign countries who are American in name only. It is bad enough that the American-born parent should retain American nationality after having established himself or herself permanently in Italy, of which he or she is also a national, and having married an Italian. It is still more absurd that the Italian-born children should also have American nationality.¹⁵

It has been proclaimed many times that American citizenship is a high privilege, that it involves obligations as well as rights, and that it should involve a real connection with and attachment to this country. If these principles are to be taken seriously, changes should be made in the laws of the United States which would prevent the manifestly absurd consequences mentioned above. This can be done without violating in any degree the principle of equality between the sexes.

Lack of space prevents a detailed discussion of the pending nationality bill (H. R. 6127). Mention may be made, however, of a few of the outstanding provisions.

The provision concerning acquisition of citizenship at birth in the case of a

¹⁴ See discussion by the author in the American Bar Association Journal for December, 1934.

¹⁵ For an interesting description of alien Americans arriving at the Port of New York see Richard O. Boyer's article, "Back Where They Came From," The New Yorker, Oct. 21, 1939.

child born abroad to parents of whom one is a citizen of the United States and the other an alien (Sec. 201(g)), resembles in the main the above-mentioned provision of Section 1 of the Act of May 24, 1934. It was proposed at one time that the conferring of nationality at birth upon children born abroad should be limited to cases in which both parents had American nationality and one had resided in this country. Such a provision would have the effect of preventing the conferring of American nationality upon children who would be likely in most cases to be alien in character, as, for example, in the Italian case referred to above. To the writer it seems unfortunate that the looser provision, now found in Section 201(g), was decided upon. It is believed that this problem, which has been rendered especially important by the application of the principle of equality between men and women with regard to nationality matters, should receive most careful consideration.

Another proposal which was not adopted by the Cabinet Committee, and does not appear in the bill, was that a person born with the nationality of a foreign state, as well as that of the United States, would lose his American nationality if he should reside for two years in the foreign state immediately after attaining the age of twenty-one years. The fact of the foreign residence was to be regarded in these cases as involving a practical election of the foreign nationality. Even without any express legislative sanction, the Department of State has in many cases denied diplomatic protection to persons of this class,¹⁶ although these rulings cannot be taken to mean that citizenship of the United States is lost.¹⁷

It seems unfortunate that the extensive discussions of dual nationality, which have been carried on for many years, should not have resulted in the adoption of some reasonable and effective provision for its termination. So long as the various states, including our own, retain in their nationality laws both *jus soli* and *jus sanguinis* (and there is no reason for believing that they will ever agree to the adoption of the one to the exclusion of the other), dual nationality cases must necessarily arise. It does not follow that dual nationality should continue to exist when a person, after attainment of majority, has clearly shown by his actions that he prefers one of the two countries to the other.

The subject of dual nationality was considered at the Hague Codification Conference in 1930. The Conference adopted a special protocol under which a person having dual nationality, who habitually resides in one of the states the nationality of which he possesses, and who is in fact most closely connected with that state, shall be exempt from military obligations in the other. This provision was taken from the draft nationality code of the Harvard Research in International Law (Article 11). While limited in scope, it is quite useful. A considerable number of states have adopted

¹⁶ 3 Moore, Int. Law Digest, § 430.

¹⁷ Flournoy, "Dual Nationality and Election," 30 Yale Law Journal, 550.

it, including the United States.¹⁸ Since its adoption our Government has concluded similar bipartite conventions with quite a number of states. Thus something has been done toward solving the problem of dual nationality, but it is not enough.

The code contains a provision (Sec. 405) under which an American national residing in a foreign state loses his American nationality as the result of naturalization therein through the naturalization of a parent. There is nothing in the recent decision of the Supreme Court in *Perkins v. Elg* to show that a provision of this kind would be unconstitutional. Moreover, the bill contains a very reasonable provision (Sec. 317) under which a person of this class who returns to the United States before reaching the age of twenty-five years may re-acquire citizenship through a very simple process of naturalization. It seems altogether likely that the majority of these persons remain in the foreign states in which they have been naturalized. It is hardly reasonable that in such cases they should continue indefinitely to be citizens of this country. Nationality laws should be based upon the realities of life, rather than legal abstractions.

The most important provisions in the pending bill are found in Sections 402-404, under which, with certain specified exceptions, naturalized citizens of the United States shall lose their citizenship if they reside for three years continuously in the foreign states from which they came. The period of foreign residence causing expatriation is shortened to two years in the cases of persons who re-acquire the nationality of their states of origin as the result of residence therein for such period. Provisions for recovery of nationality through residence in the countries of origin are found in the laws of Italy, Norway, and Sweden.

It has been contended that provisions for termination of American nationality as the result of protracted residence in foreign countries, in cases of naturalized citizens and persons having dual nationality, would be unconstitutional, in view of the provision of the Fourteenth Amendment to the Constitution that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States." This contention is specious and devoid of validity. The Supreme Court held long ago that the object of the provision in question was merely to make it clear that the negroes, formerly slaves, born in this country, and their descendants, were to have the status of citizens.¹⁹ The provision had nothing whatsoever to do with the expatriation of persons residing abroad.

In *Mackenzie v. Hare* (1915),²⁰ the Supreme Court held that Congress has the power, under the Constitution, to prescribe rules under which persons may expatriate themselves by acts deemed inconsistent with retention of citizenship, without any voluntary renunciation of the same. It will be recalled that this decision related to a native American woman who expatriated

¹⁸ Treaty Series, No. 913.

¹⁹ *Slaughter House Cases*, 16 Wall. 36.

²⁰ 239 U. S. 299.

herself under the provision of Section 3 (since repealed) of the Act of March 2, 1907 (*supra*), by marrying a British subject, even though she had not left the United States. In rendering the opinion of the Supreme Court in this case, Mr. Justice Sutherland said, with regard to the question whether Congress had the power to prescribe a statutory rule, under which an American woman would lose her American nationality by the mere act of marrying an alien:

Plaintiff contends, as we have seen, that it has not, and bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. As a government the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.²¹

As indicated above, the courts have repeatedly emphasized the fact that citizenship involves obligations as well as rights. In *Luria v. United States* (1913),²² the Supreme Court upheld the decree of a District Court in canceling, under the provision of Section 15 of the Act of June 29, 1906, the naturalization of a person who had established a permanent residence abroad within five years after procuring naturalization. Mr. Justice Van Devanter in rendering the opinion in this case called attention to the requirements of the Naturalization Act concerning an intention to reside in the United States, and said:

These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past. (P. 23.)

Aside from the desirability of making certain substantive changes in the existing nationality laws, it is a great desideratum to have the various provisions of law governing nationality brought together in a single, logically arranged code, so drafted that he who runs may not only read but understand. The unusual difficulties experienced by the courts and executive departments in construing nationality laws in the past serve to emphasize the importance of having these laws properly drafted. Horace Binney, in a noted article published in the *American Law Register* in the year 1854²³ concerning "The Alienigenae of the United States," discussed the defective drafting of the Act of April 14, 1802, governing the citizenship of children

²¹ With regard to the question under consideration, see also *Ex parte Griffin*, 237 Fed. 445.

²² 231 U. S. 9.

²³ Vol. 2, p. 193.

born abroad of American parents, and with reference to nationality in general said:

The great object of such provisions should be, to give clearly and unambiguously, the rights which it means to give; for no ambiguity is more pernicious than such as tend to disturb individuals and families in regard either to succession to property, or to the exercise of franchises.

It is a truism, perhaps, to say that in legislating for a democracy the welfare of the people as a whole should always be kept in mind. Legislation, however, involves a consideration of conflicting claims and a view to arriving at a reasonable mean, for the benefit of the country as a whole. In a recent issue of *The Nation*, one of the editors expressed the view that "every act of legislation is a choice of evils." This is a pessimistic way of expressing the fact that all important legislation involves compromises, although not necessarily compromises between good and evil. The proposed Nationality Code, contained in H. R. 6127, may meet with opposition, at least as to some particulars, by various individuals and organizations especially interested in particular classes of persons, and in individual cases. While they should, of course, be accorded a fair hearing, it will probably be impossible to give in to all of their arguments. In their nature, they require some sacrifices on the part of individuals or groups, and this is especially true with regard to nationality laws, which relate to the very substance and texture of the state itself. In the shaping of such laws, affecting profoundly, as they do, the character of the country, it is most important to consider first and last, not only the claims of special groups and individuals, who are likely to be represented by special advocates, but the welfare of the people as a whole, whose only advocates are to be found in the membership of the Congress itself.

RELATIONS OFFICIEUSES AND INTENT TO RECOGNIZE:
BRITISH RECOGNITION OF FRANCO

By HERBERT W. BRIGGS

Of the Board of Editors

The decisions of the British courts in *The Arantzazu Mendi*¹ and *Banco de Bilbao v. Sancha and Rey*² that the British Government had accorded *de facto* recognition to the Franco insurgents become all the more curious in the light of unequivocal denials by the Prime Minister and the Foreign Secretary in the House of Commons that such recognition had been accorded prior to the dates of these decisions. An examination of these statements in the House of Commons raises an interesting question: What constitutes *de facto* recognition? More particularly, do (1) the conclusion of an agreement of a "provisional" nature with an unrecognized régime, or (2) the institution of "unofficial" relations (*relations officieuses*) therewith, or (3) the granting of immunities to executive agents, constitute *de facto* recognition of the régime so treated?

John Bassett Moore states what has long been regarded as the orthodox view. "Recognition," he writes, "is not necessarily express; it may be implied, as when a state enters into negotiations with the new state, sends it diplomatic agents, receives such agents officially, gives exequaturs to its consuls, forms with it conventional relations."³ In somewhat similar vein the *Institut de Droit International* has recently stipulated in Article 9 of its Resolutions on the Recognition of New States and New Governments: "Recognition '*de facto*' [of a new state] results either from an express declaration or from an act implying this intention, such as an agreement or *modus vivendi* having a limited purpose or a provisional character"; and in Article 14, dealing with new governments: "Recognition '*de facto*' of a new government is manifested: (1) either by an express declaration, (2) by the signing of agreements having a limited purpose or a provisional character, (3) or by the maintenance of relations with the new government for the purposes of current affairs."⁴

Judge Moore is apparently speaking of official relations and does not discuss the intent of the recognizing state. The *Institut* draft refers to intent in Article 9, but apparently disregards it in Article 14. The designation of diplomatic relations with an unrecognized state or government as *officieuses*

¹ [1939] A. C. 256; this JOURNAL, Vol. 33 (1939), p. 583. See also Briggs, "*De Facto* and *De Jure* Recognition: *The Arantzazu Mendi*," this JOURNAL, Vol. 33 (1939), pp. 689-699.

² [1938] 2 K. B. 176. ³ J. B. Moore, *A Digest of International Law* (1906), Vol. I, p. 73.

⁴ *Annuaire de l'Institut de Droit International* (Brussels, 1936), Vol. 2, pp. 300-305; translation in this JOURNAL, Vol. 30 (1936), Supp., pp. 186, 187.

may be a subterfuge, but it is a frequent practice. Does the institution of such relations constitute recognition?⁵

On November 4, 1937, Mr. Attlee asked the Prime Minister in the House of Commons "whether the Government have decided to accord *de facto* recognition to the Spanish insurgents; if so, when was this decision reached; what precisely does *de facto* recognition signify; . . . and what steps are being taken to give effect to it?" To these questions Mr. Neville Chamberlain replied, in part, that His Majesty's Government had no intention of abandoning the international agreement for non-intervention, but that "the protection of British nationals and British commercial interests throughout the whole of Spain including those large areas . . . of which General Franco's forces are now in effective occupation" rendered it "increasingly evident that the numerous questions affecting British interests in these areas cannot be satisfactorily dealt with by means of the occasional contacts which have hitherto existed." Accordingly, he continued, "His Majesty's Government have entered upon negotiations for the appointment of agents by them and by General Franco respectively for the discussion of questions affecting British nationals and commercial interests, but these agents will not be given any diplomatic status." Asked next "whether there is any precedent for making such an arrangement when full recognition is accorded to the lawful Government of Spain," Mr. Chamberlain wished notice of the question, but doubted whether any precedents existed for the exact conditions which had to be met. Mr. Attlee persisted: "Does not this, in effect, mean a *de facto* recognition of the Insurgent Government?" The Prime Minister replied: "No, Sir; I am advised that it makes no difference in the existing situation."⁶

On November 8, 1937, the Secretary of State for Foreign Affairs explained more fully the Government's position.⁷ After telling the House of Commons of the many millions of pounds sterling invested in iron ore, copper and lead mines, and sherry, in the two-thirds of Spain controlled by Franco, Mr. Eden stated that there had been "interference" with British interests, and the difficulties called for direct negotiations with Burgos or Salamanca, but the machinery was lacking. The only career consuls in General Franco's territory were stationed at the ports.⁸ It would have been possible to trans-

⁵ I will not be able to examine in this article—except incidentally—the more specific problem of whether the conclusion of an agreement of a "provisional" nature with an unrecognized régime constitutes recognition willy-nilly. Consult L. L. Jaffe, *Judicial Aspects of Foreign Relations—In Particular of the Recognition of Foreign Powers* (1933), p. 113 ff. See also Manley O. Hudson, "Recognition and Multipartite Treaties," this JOURNAL, Vol. 23 (1929), pp. 126-132.

⁶ *Parliamentary Debates, House of Commons, Official Report* (cited hereafter as *Hansard*, 5th Series), Vol. 328, cols. 1124-1125.

⁷ *Ibid.*, cols. 1385-1388.

⁸ On Feb. 8, 1939, Mr. R. A. Butler, Parliamentary Undersecretary for Foreign Affairs, gave the House the following information: "Consuls appointed before General Franco's forces acquired control of the places where they reside continue to carry out their functions

✓ fer consuls to Burgos and Salamanca, "but the appointment of new consuls with commissions from His Majesty the King and the grant to them of an exequatur by the authorities at Salamanca would have implied a measure of recognition of these authorities." So the Government decided upon an exchange of agents "upon a basis of strict reciprocity." However, "the reception of such an agent [*i.e.*, the Franco agent] in London will not in any way constitute recognition by H. M. Government of the authorities of the territories under the control of General Franco, and neither party will accord or expect to receive diplomatic status for their agents."⁹

Mr. A. V. Alexander, for the opposition, thought "this proposal to exchange missions with the Franco Government . . . a long way towards the recognition of Franco," but was thankful "that there is no official recognition on a diplomatic basis." (Mr. Eden interrupted to say that the exchange of agents "does not constitute recognition, official or unofficial. . . . No recognition whatever."¹⁰)

(As the opposition had feared, Sir Robert Hodgson was appointed (on November 15, 1937) British agent in Franco-controlled territory.¹¹) The opposition recalled with suspicion that Sir Robert had been the first British agent to Soviet Russia in 1921 and had been sent "to prepare the way for recognition" of the Soviets.¹² In reply to a question, Viscount Cranborne, Undersecretary of State for Foreign Affairs, explained to the House of Commons on November 29, 1937, the British diplomatic position with reference to Spain:

The Ambassador at Hendaye is accredited to *Spain*. At present there are two authorities in Spain, *one of whom we do not recognize*. At Barcelona, therefore, we have a Minister Plenipotentiary and in the other case we have commercial agents to protect our commercial interests. . . . Both the Minister and the agents I have mentioned are subordinate to the Ambassador at Hendaye.¹³

When Sir Robert Hodgson arrived at Salamanca he informed the Franco authorities that if he met with a friendly disposition, "we shall have achieved something leading to the re-establishment of the normal relations, confidence and friendship which have existed for so many centuries between

at Seville, Barcelona, Palma, Las Palmas, and Teneriffe; and vice-consuls at Corunna, Jerez de la Frontera, Huelva, Gijon, La Linea, Orotava, and Fernando Po. There are also acting vice-consuls at Algeciras, Cadiz and San Feliu de Guixols. Assistant agents, who perform similar duties, have been appointed at Bilbao, Malaga, San Sebastian, and Vigo since General Franco's forces occupied these towns." Hansard, 5th Ser., Vol. 343, col. 919.

⁹ *Ibid.*, Vol. 328, col. 1386.

¹⁰ *Ibid.*, cols. 1503 and 1510.

¹¹ New York Times, Nov. 17, 1937, 6:5.

¹² Hansard, 5th Ser., Vol. 328, col. 1518. The French press was reported as greatly upset by the British plan to exchange agents with the Franco régime. New York Times, Nov. 4, 1937, 2:3.

¹³ Hansard, 5th Ser., Vol. 329, col. 1665. Italics by the writer. See also *ibid.*, Vol. 338, cols. 195-196.

Spain and my country." Mr. Attlee inquired in the House of Commons whether "the establishment of normal relations imply the recognition of a government which H. M. Government do not recognize at the present time?" ✓ Mr. Eden thought not, but Mr. Attlee opined that "it looks more like the opening of diplomatic relations prior to recognition."¹⁴

In the meantime the Duke of Alba and Berwick was "appointed by General Franco to be his agent in the United Kingdom."¹⁵ The Duke of Alba, former Foreign Minister of King Alfonso, had been an unofficial representative of Franco in London for some months, and as early as November 2, 1937, was reported to be the sponsor of the plan to exchange agents between the British Government and General Franco.¹⁶ On April 4, 1938, the Prime Minister was asked:

(1) Why in a communication from the Foreign Office to the London County Council Motor License Department, dated 4th March, reference is made to the "Spanish Nationalist Government," as this conflicts with the assurances that the reception of an agent of General Franco in London in no way constituted recognition by H. M. Government of the authorities of the territories at present under the control of General Franco; (2) Why diplomatic privileges have been extended to the Duke of Alba, contrary to assurances that were given by H. M. Government . . . ?

Mr. R. A. Butler replied for the Government that the use of the phrase "Spanish Nationalist Government" in a semi-official Foreign Office letter

implies no sort of modification of the attitude of H. M. Government in regard to the recognition of General Franco's administration. Under the agreement made with the latter for the exchange of agents, diplomatic status was not to be claimed for them, and no such claim has in fact been made or conceded by either party to the agreement. It was, however, felt desirable to secure for the British Agent and his staff certain privileges of a kind which are commonly enjoyed by diplomatic officials in order to facilitate the discharge of their duties. It was found necessary to concede corresponding privileges such as the one in question to General Franco's Agent and his staff. Such concessions made by either side involve no admission that the recipients possess diplomatic status, in proof of which it should be sufficient to say that certain reliefs which could be granted only on the basis of such status are withheld from the Duke of Alba and his staff, and the privileges accorded to them are of a limited character.

The honorable Member who had raised the question feared that recognition would take place gradually, by stages.¹⁷

¹⁴ Hansard, 5th Ser., Vol. 330, cols. 1583-1584, 1800. See also *The Times* (London), Dec. 20, 1937, 11:4. ¹⁵ *Ibid.*, Vol. 330, col. 4. The phraseology is Eden's, on Dec. 6, 1937.

¹⁶ *New York Times*, Nov. 3, 1937, 2:2; *ibid.*, Nov. 28, 1937, 1:2.

¹⁷ Hansard, 5th Ser., Vol. 334, cols. 4-5. On the use of the title "Spanish Nationalist Government" see also *ibid.*, Vol. 333, col. 1979, and Vol. 337, col. 1510. This was also the title used by the Foreign Office in their letters to the British courts. The day after Mr.

On February 17 and May 28, 1938, the British Foreign Office informed British courts that H. M. Government, while recognizing the Government of the Spanish Republic as the *de jure* Government of Spain, recognized that the Nationalist Government exercised *de facto* administrative control over the larger portion of Spain. The courts in both cases interpreted the Foreign Office letters as stating that the British Government had granted *de facto* recognition to the Franco régime.¹⁸ Nevertheless, subsequently on February 13, 1939, when Mr. Arthur Henderson asked the Prime Minister whether he would assure the House "that, in view of the changed military situation in Spain, H. M. Government do not contemplate recognizing the Spanish insurgent authorities as the *de facto* or *de jure* Government of Spain," Mr. Chamberlain replied that it was obviously impossible to give such assurance in a situation changing so rapidly, but that H. M. Government "have taken no decision as yet on the matter."¹⁹ This last clause, taken in connection with the phraseology of the question asked, appears to the writer to be a denial by Mr. Chamberlain that the British Government had accorded at this date even *de facto* recognition to the Franco régime.

A reference to the manner in which the British Government recognized *de facto* the Italian conquest of Ethiopia would seem to confirm this view. On January 19, 1937, Mr. Anthony Eden, while denying that the British Government had recognized the assumption by the King of Italy of the title of Emperor of Ethiopia, informed the House of Commons that

in view of the fact that the Abyssinian territories where British subjects had interests were under the control of the Italian authorities, H. M. Ambassador in Rome, on instructions, informed the Italian Minister for Foreign Affairs on 21st December [1936] of the decision of H. M. Government to withdraw the British legation at Addis Ababa and to substitute for it a Consulate-General.²⁰

A year later (March 17, 1938), in reply to a question as "to the date on which H. M. Government recognized the Italian Government as the Government *de facto* of virtually the whole of Abyssinia," Mr. R. A. Butler stated in part: "H. M. Government have, since December, 1936, recognized the Italian Government as the Government *de facto* of the parts of Abyssinia which they control."²¹ In the Ethiopian case the communication of December 21, 1936, to the Italian Foreign Minister was evidently intended to

Chamberlain announced the *de jure* recognition of the Franco Government, the Prime Minister referred to the Spanish Republican Government as "the Red leaders." *Ibid.*, Vol. 344, col. 1118, Feb. 28, 1939.

¹⁸ Cf. *Banco de Bilbao v. Sancha and Rey*, *loc. cit.*; *The Arantzazu Mendi*, *loc. cit.*; Briggs, *loc. cit.*

¹⁹ Hansard, 5th Ser., Vol. 343, cols. 1340-1341. Cf. also, *ibid.*, col. 1698, Feb. 15, 1939, and *ibid.*, Vol. 344, col. 5, Feb. 20, 1939. In the meantime British Government spokesmen ceased referring to the Franco régime as the Spanish Nationalist Government and as late as Feb. 20, 1939, Mr. R. A. Butler referred to it as "the Burgos authorities." *Ibid.*, Vol. 344, col. 3.

²⁰ *Ibid.*, Vol. 319, col. 32.

²¹ *Ibid.*, Vol. 333, col. 617.

constitute *de facto* recognition; but the relations between the British Government and the Franco régime in Spain were not considered as implying *de facto* recognition.

The Franco Government was eventually recognized *de jure* by the British Government on February 27, 1939. Mr. Chamberlain, after telling the House of Commons that the Republican forces no longer had a chance of winning, added:

Moreover, it seems to H. M. Government impossible to regard the Spanish Republican Government, scattered as it is and no longer exercising settled authority, as the Sovereign Government of Spain. In these circumstances, they have decided to inform General Franco of their decision to recognize his Government as the Government of Spain and formal action has been taken in this sense today.²²

(It seems quite obvious that the British Government regarded intent as an essential element in the concept of recognition. Neither the agreement for the exchange of agents with the Franco régime, nor the actual exchange and activities of these agents, nor even the granting to them of what amounted to diplomatic immunities was considered *de facto* recognition.)

There are many precedents for the conduct of *relations officieuses* with unrecognized states or governments. It is clear from the precedents that no recognition was intended by the practice, nor is any such implication properly to be drawn. For some years prior to its recognition of the South American states, the United States was represented in these actually independent states by executive agents.²³ Joel Poinsett was sent in 1810 to Buenos Ayres, Peru, and Chile. His title was "Agent for Seamen and Commerce in the Port of Buenos Ayres." Later he was appointed "Consul General," and other agents and consuls were appointed to South American states. Paxton comments that "there existed no intent to recognize the governments at this time, and the administration was not sure that the juntas would give public recognition to United States consuls who could not give reciprocal recognition to them. . . . No trace has been found of an *exequatur* issued to any of these agents, but they speak in their despatches of being formally received."²⁴ British practice was similar from 1811 until recognition was accorded more than a decade later. Professor H. A. Smith notes "the elaborate care taken to express the consular appointments to South America in a manner which should not involve a recognition, even *de facto*, of the insurgent governments."²⁵

During the American Civil War the British Government appointed agents

²² Hansard, 5th Ser., Vol. 344, col. 873.

²³ Frederic L. Paxton, *The Independence of the South American Republics* (1903), p. 106 ff.

²⁴ *Ibid.*, p. 111.

²⁵ H. A. Smith, *Great Britain and the Law of Nations*, Vol. I (1932), p. 80. See also the documentary evidence of British practice, *ibid.*, pp. 115-170. In *Taylor v. Barclay*, 2 Sim. 214 (1828), plaintiff contended that the appointment of consuls to Spanish America and the meeting of British and Guatemalan officials at the Panama Congress might be considered recognition. The Vice-Chancellor, however, said that the British Foreign Office had in-

to reside in the Confederate States to protect British interests. On November 26, 1861, Earl Russell, British Foreign Minister, wrote to the American Ambassador, Mr. Charles Francis Adams, that it might be necessary for the British Government "to have further communications both with the central authority at Richmond and with the governors of the separate States . . . but such communications will not imply any acknowledgement of the confederates as an independent state."²⁶

On February 18, 1873, Count d'Harcourt informed M. de Rémusat: "*Les instructions données au diplomate anglais à Madrid sont de continuer à gérer les affaires à titre provisoire avec le Gouvernement nouveau, mais de s'abstenir de toute démarche équivalent à une reconnaissance. . . .*"²⁷

On March 30, 1873, M. de Rémusat, French Foreign Minister, instructed the consular agents of France in Spain that the French Government was faithful to the principle of non-intervention in Spain and had not recognized the new government, "*mais vous devez vous maintenir en bons rapports avec les magistratures et les administrations locales.*"²⁸

On June 14, 1879, Secretary of State Evarts instructed the American Minister in Venezuela on his relations with the new government:

Pending formal recognition, however, it is not to be supposed that any of the customary business relations or civil courtesies are abruptly terminated. The actual formula of recognition is unmistakable, and, short of that evident step, the diplomatic fiction of "officious" intercourse, or "unofficial" action is elastic enough to admit of continuing ordinary intercourse, for the most part, without rupture of any of its varied parts.²⁹

Similarly, on December 16, 1885, after a revolution in Peru, Secretary of State Bayard instructed the American Minister:

It will be your province to maintain the most friendly and intimate relations with whatever government may be fully established and in possession of the power of the nation. It is, however, for the President to determine when and how formal recognition of the new government of Peru by the United States shall be effected. . . . In point of fact, your intercourse with the government during the brief interregnum will be as full and direct as though the formality of recognition had taken place. . . .³⁰

formed him that Guatemala had not been recognized by Great Britain. Cf. P. L. Bushe-Fox, "The Court of Chancery and Recognition, 1804-81," 12 *British Year Book of International Law* (1931), pp. 63, 71.

²⁶ Message of the President of the United States . . . and Papers Relating to Foreign Affairs (1862). 37th Cong., 3d sess., House of Representatives, Ex. Doc. No. 1, p. 9. Earl Russell to Mr. Adams, Nov. 26, 1861. Cf. also Milledge L. Bonham, *The British Consuls in the Confederacy* (Columbia University Thesis, 1911), *passim*.

²⁷ *Documents diplomatiques français*, I, 1, No. 173, p. 207.

²⁸ *Fontes Juris Gentium*, Ser. B, Sec. 1, Tom. 2, Pars 1, p. 100.

²⁹ Moore, *Digest*, I, 151.

³⁰ *Ibid.*, 159-160. See also, Secretary Olney to Mr. Tillman, American Minister in Ecuador, Nov. 6, 1895, *ibid.*, p. 156; and Hill, Acting Secretary, to Hart, American Minister at Bogotá, Sept. 8, 1900, *ibid.*, p. 139.

Although the United States refused to recognize the Huerta administration in Mexico in 1913, it kept its embassy open. In *United States (Geo. W. Hopkins Claim) v. United Mexican States*, the U. S.-Mexican General Claims Commission described the situation as follows:

Embassies, legations, and consulates of a nation in unrest will practically continue their work in behalf of the men who are in control of the capital, its treasury, and the foreign office—whatsoever the relations of these men to the country at large may be. Embassies, legations, and consulates of foreign nations in such capital will practically discharge their routine duties as theretofore, without implying thereby a preference in favor of any of the contesting groups or parties. . . . Even the United States, though placing the stamp of disapproval in the most unmistakable manner on the act of Huerta in usurping authority, kept its embassy in Mexico City open for the transaction of routine business, entrusting it to a *chargé d'affaires*, and maintained its consulates throughout Mexico.²¹

The practice of appointing special agents to negotiate with unrecognized governments was followed by the United States in Nicaragua in 1910,²² in Mexico at various times from 1913 to 1923,²³ in Haiti in 1915,²⁴ and in Santo Domingo in 1922.²⁵ There was also the Bullitt mission to Russia in 1919.²⁶ Far from implying recognition, one of the purposes of these missions was usually to prepare the way for recognition.

The early relations of the United States with the Baltic states are particularly instructive. For more than two years prior to its recognition of Estonia, Latvia, and Lithuania, the United States had a Commissioner and consuls resident in the Baltic states. These men were in frequent communication with the local foreign offices.²⁷ In 1920 the United States refused an Estonian request for a consul in the United States, stating: "This Government cannot, in any event, grant an *exequatur* to a consul from a non-recognized Government."²⁸ A few days later the American Commissioner at Riga (Young) was authorized to "inform the Esthonian authorities that the United States Government would have no objections to their sending to this country an unofficial agent with the same status as those of Latvia and Lithuania."²⁹ The Estonian Government, however, in an attempt which was characterized by the American Commissioner as a "very silly effort to force some sort of recognition,"³⁰ appointed Edward Wirgo, Assistant Foreign Minister, to be their unofficial representative in the United States, but (reported the United States Consul at Reval to the Department) the

²¹ *Opinions of Commissioners* (1927), pp. 42, 45, 46.

²² See Henry M. Wriston, *Executive Agents in American Foreign Relations* (1929), p. 508.

²³ *Ibid.*, pp. 489-506. ²⁴ *Ibid.*, pp. 510-513. ²⁵ *Ibid.*, pp. 515-516. ²⁶ *Ibid.*, p. 523.

²⁷ Cf. U. S. Foreign Relations, 1920, Vol. III, p. 640 ff. The United States recognized the three Baltic states on July 28, 1922. *Ibid.*, 1922, Vol. II, p. 873.

²⁸ U. S. For. Rel., 1920, Vol. III, p. 661. The Secretary of State (Colby) to the Commissioner at Riga (Young), Sept. 11, 1920.

²⁹ *Ibid.*, p. 662. Colby to Young, Sept. 23, 1920.

³⁰ *Ibid.*, p. 664.

Estonian Government asked "whether he will be *persona grata*, and whether he can use title of Commissioner, issue passports, use code and be accorded diplomatic privileges such as are extended to Commissioner Young."⁴¹ The reply of the Department was sent to Commissioner Young: The United States refused to accord Mr. Wirgo "a status superior to that of the unofficial agents of Latvia and Lithuania" in the United States, and threatened "the withdrawal of any American representative in Estonia." The note added:

This same question has been raised elsewhere as for instance in Germany where the American Commissioner enjoys privileges which are not accorded by this Government to any agent of Germany. When this lack of reciprocity was urged as a reason for the reception of a German agent with similar status in this country, the German Foreign Office was informed that Mr. Dresel would be withdrawn if he was not acceptable on the present status.⁴²

Instances of *relations officieuses* with unrecognized states and governments might be multiplied at some length, but it will perhaps be sufficient to refer here to one more case. In *Luther v. Sagor* the status of the Russian agents in England was examined at some length by the Court of Appeal:

The following letters relating to the position of L. B. Krassin, the Russian Commercial Delegation, and the Russian Socialist Federal Soviet Republic were received in evidence before Roche, J.:

(1) A letter dated July 28, 1920, written on behalf of His Majesty's Secretary of State for Foreign Affairs to the solicitors for L. B. Krassin. It stated that Krassin was the authorized representative of the Soviet Government and had been received by His Majesty's Government for the purpose of carrying out certain negotiations. It further stated that His Majesty's Secretary of State regarded Krassin as a foreign representative and as one who in view of the negotiations should be exempt from the process of the Courts.

(2) A letter of October 5, 1920, written on behalf of His Majesty's Secretary of State for Foreign Affairs to the defendants' solicitors which stated that: "His Majesty's Government assent to the claim of the Delegation to represent in this country a State Government of Russia."

⁴¹ U. S. For. Rel., 1920, Vol. III, p. 662. Albrecht to Colby, Oct. 6, 1920. "Wirgo was one of the commission to obtain recognition of the Entente Powers." *Ibid.*

⁴² *Ibid.*, p. 663. Colby to Young, Oct. 11, 1920. For the status, and the relations of American Commissioner Ellis Loring Dresel with the German Foreign Office prior to the treaty of peace with Germany, see U. S. For. Rel., 1919, II, p. 244 and *ibid.*, 1920, II, p. 258 ff. Compare also the status of the "American Commissioner at Vienna," Mr. Arthur Hugh Frazier, from Sept. 13, 1920, to Nov. 26, 1921. On Nov. 19, 1921, Secretary of State Charles Evans Hughes informed Frazier that by the exchange of ratifications of the peace treaty, "diplomatic relations between the United States and Austria may be resumed. You are instructed to request your provisional recognition as Chargé d'Affaires pending arrival letters of credence . . . Inform consuls." *Ibid.*, 1921, I, p. 279. See also *Salm v. Frazier*, Court of Appeals of Rouen, 1933, this JOURNAL, Vol. 28 (1934), p. 382. Mr. Ulysses Grant-Smith was "American Commissioner at Budapest" prior to the conclusion of the treaty of peace with the new Hungarian Government. Cf. U. S. For. Rel., 1921, II, pp. 249, 260.

(3) A letter dated November 27, 1920, written on behalf of His Majesty's Secretary of State for Foreign Affairs to the plaintiffs' solicitors which stated that "for a certain limited purpose His Majesty's Government has regarded Monsieur Krassin as exempt from the process of the Courts, and also for the like limited purpose His Majesty's Government has assented to the claim that that which Monsieur Krassin represents in this country is a State Government of Russia, but that beyond these propositions the Foreign Office has not gone, nor moreover do these expressions of opinion purport to decide difficult and, it may be, very special questions of law, upon which it may become necessary for the Courts to pronounce. [I am to add that His Majesty's Government have never officially recognized the Soviet Government in any way.]' . . .

Roche, J., upon the evidence before him found that His Majesty's Government had not recognized the Russian Soviet Government as the Government of a sovereign state or power.⁴³

Banks, L. J., for the Court of Appeal, said in part: "Upon the evidence which was before the learned judge [Roche, J.] I think that his decision was quite right. As the case was presented in the Court below the appellants relied on certain letters from the Foreign Office as establishing that H. M. Government had recognized the Soviet Government as the *de facto* Government of Russia. . . . He took the view that the letters relied on did not establish the appellants' contention. In this view I entirely agree."⁴⁴

This survey of the practice of states may well be concluded with a reference to the opinions of three recent students of the subject.

Discussing British practice, Professor H. A. Smith writes:

Non-recognition does not mean non-intercourse, since intercourse of some kind is unavoidable between all important communities which are in fact organized as states. In practice the Foreign Office has never refused to transact necessary business with the agents of unrecognized states, though care has always been taken to make it clear that these informal conversations were carried on under conditions visibly differing from those of regular diplomatic intercourse.⁴⁵

H. M. Wriston summarizes American practice as follows:

. . . It is evident that executive agents have been frequently sent to new states before recognition was granted, in order to secure information regarding the stability of the country, and informally to protect American interests and press claims of United States citizens. For similar purposes special agents have been despatched to unrecognized governments when the regular representatives had withdrawn. In either case the appointment of an ambassador, minister, or chargé would have involved recognition, which it was deemed proper to withhold for the time being, although informal relations were desirable and sometimes necessary. Occasionally, in recent times, executive agents have been sent to discuss the conditions upon which the United States would accord recognition to a *de facto* government.⁴⁶

⁴³ A. M. Luther v. Sagor, [1921] 3 K. B. 532, 534-535.

⁴⁴ *Ibid.*, p. 540.

⁴⁵ H. A. Smith, *op. cit.*, p. 79.

⁴⁶ H. M. Wriston, *op. cit.*, p. 525.

Finally, Professor L.-A. Podesta Costa, sometime Director of the Legal Section of the League of Nations Secretariat, has written:

2. Les relations officieuses peuvent être maintenues au moyen de démarches ou de représentations faites par les États étrangers devant le gouvernement *de facto*, ou bien par des actes de même nature réalisés par le gouvernement *de facto* auprès des États étrangers.

3. Les représentants diplomatiques ou consulaires accrédités dans un pays dans lequel un gouvernement *de facto* assume le contrôle des affaires ne cessent pas *de plano* de remplir leurs fonctions ni ne perdent leurs immunités pour une telle circonstance. Ils peuvent maintenir avec lui des relations de courtoisie; et, sous une forme officieuse, ils peuvent faire les démarches nécessaires chaque fois qu'il sera indispensable de protéger les intérêts de leurs nationaux. Les agents consulaires continuent à remplir leurs fonctions sans qu'il soit nécessaire de renouveler leur *exequatur*.

4. Les agents diplomatiques d'un État ne perdent pas leur droit de représentation ni leurs immunités diplomatiques par la circonstance que dans l'État qu'ils représentent un gouvernement *de facto* aura assumé le contrôle des affaires publiques.

5. Les démarches officieuses effectuées par l'intermédiaire des représentants diplomatiques qui étaient accrédités devant le gouvernement déposé, ou par des envoyés devant le nouveau gouvernement, ou par des agents spéciaux reçus de lui ne signifient pas la reconnaissance du gouvernement *de facto*, même si elles sont répétées au point de prendre l'aspect de relations continues.

6. Les relations officielles avec un gouvernement *de facto* s'établissent par sa reconnaissance formelle.⁴⁷

After this summary of practice and doctrine, it would seem a work of supererogation to set forth detailed conclusions. (It may be observed, however, that when international agreements are concluded with an unrecognized régime, when agents are exchanged, or when the regular consular and diplomatic officials negotiate with the unrecognized régime—the diplomats even being clothed with quasi-diplomatic immunities—the line between recognition and non-recognition is at best somewhat tenuous.) (One might contend that the conduct of *relations officieuses* with an unrecognized régime amounts to *de facto* recognition, but the practice of states negates this; and, since the granting or withholding of recognition is a matter of policy, the intent of the non-recognizing state must be regarded as determinant.)

⁴⁷ L.-A. Podesta Costa, "*Règles à suivre pour la reconnaissance d'un gouvernement de facto par des États étrangers*," 29 *Revue générale de droit international public* (1922), pp. 47, 58.

THE RESPONSIBILITY OF STATES FOR INTERNATIONAL PROPAGANDA

BY VERNON VAN DYKE

Assistant Professor of Political Science, DePaul University

The tendency in recent world history toward the establishment of political parties based on class or racial ideologies in which no place of respect is given to established territorial boundaries has greatly intensified the problem of the responsibility of states in connection with international propaganda. Two main questions arise: (1) Are states themselves obliged under international law to refrain from spreading propaganda in a foreign country hostile to its government? and (2) Are they obliged to use due diligence to prevent private individuals and organizations from engaging in such activity?¹ The purpose of this study is to seek the answer to these questions through an analysis of the sources of international law referred to in Article 38 of the Statute of the Permanent Court of International Justice: (a) international conventions, (b) diplomatic exchanges, giving evidence of international custom, (c) general principles embodied in municipal laws and judicial decisions, and (d) the attitude of writers on international law. Treatment of the subject will begin here with the period of the French Revolution and will be limited to peace-time political propaganda. The problem is, of course, much older and broader than these limits suggest, but it is believed that their extension would not contribute materially to the purpose at hand.

INTERNATIONAL CONVENTIONS

Treaties in which the parties pledge themselves not to spread propaganda hostile to each other are numerous. The obligation is probably implicit in various treaties to which all the Great Powers were parties during the period of the French Revolution and Napoleon, as well as in a number of subsequent treaties providing for the acceptance of the principle of non-interference in the internal affairs of other countries. Since the World War the obligation has been made explicit in treaties and agreements which the Soviet Union has made with some fifteen of the states with which it has established

¹The principle is well established that an obligation upon a government to abstain from certain activities does not necessarily involve an obligation to prevent private individuals within its territory from engaging in them. This is indicated by the fact that the Hague Conventions allow governments to permit their subjects to carry on activities forbidden to themselves (see particularly the Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Arts. 6 and 7), and by the attitude of various writers (see, for instance, Clyde Eagleton, *The Responsibility of States in International Law* (1928), p. 79).

diplomatic relations, in treaties between Great Britain and Italy, and in the Convention Concerning the Use of Broadcasting in the Cause of Peace (signed at Geneva, September 23, 1936),² which has been ratified by some 19 states. Only Greece and Serbia, in agreeing in 1867 and 1868 to spread propaganda in neighboring Turkish territory, have formally contradicted the principle on which these other treaties rest.³

Even more numerous are treaties dealing with governmental responsibility for private propaganda activities. In some of them the acceptance or imposition of such a responsibility is clear and unchallenged, as in the case of the treaty between France and Russia in 1801,⁴ the press law of the Germanic Confederation in 1819,⁵ the treaty of 1881 between Austria-Hungary and Serbia,⁶ and at least eleven treaties put into effect by 39 different states since 1900.⁷ In addition to these treaties, the obligations of which apply to the activities of all individuals under the jurisdiction of the respective parties, some 15 of the Central and South American states have at various times been parties to agreements concerning only political refugees, the obligation being to prevent them from living in border regions or engaging in activities which might disturb the peace of the country from which they fled.⁸

In other treaties the acceptance or imposition of the responsibility in question is doubtful, or at least has been denied, as in the case of a group of treaties between the Great Powers concluded following the events of 1789

² Printed in this JOURNAL, Supp., Vol. 32 (1938), p. 113.

³ S. Th. Lascaris, "*La première alliance entre la Grèce et la Serbie (Le traité de Vooslau du 14-26 août 1867)*," *Le monde slave*, N.S., Vol. 3 (1926), pp. 430, 436.

⁴ Art. 3 of this treaty reads in part as follows:

"The two contracting parties, wishing in so far as it is in their power to contribute to the tranquillity of their respective governments, mutually oblige themselves not to permit any of their subjects to carry on any correspondence whatever, direct or indirect, with the internal enemies of the existing government of the two states, to propagate there principles contrary to their respective constitutions, or to incite disorders." (Martens, *Recueil de traités* [1817-1836], Vol. 7 [1800-1803], p. 387.)

⁵ J. H. Robinson (ed.), "The Restoration and the European Policy of Metternich, 1814-1820," *Translations and Reprints from the Original Sources of European History* (University of Pennsylvania, 1894), Vol. 1, Ser. 1, p. 17.

⁶ A. F. Pribram, *The Secret Treaties of Austria-Hungary, 1879-1914* (1920), pp. 51-53.

⁷ The wording of the pledges in these treaties is not uniform, and, of course, the obligation in each case is only between the contracting parties. The treaties included in this list may be found at the following sources: League of Nations Treaty Series: Vol. 2, No. 52, p. 97; Vol. 9, No. 257, p. 249; Vol. 64, No. 1511, p. 387; Vol. 87, No. 1971, p. 215; Vol. 174, No. 4044, p. 133; Vol. 186, No. 4319, p. 303; Vol. 190, No. 4402, p. 27; Martens, *Nouveau recueil général de traités*, 3rd ser.: Vol. 3, pp. 94-101; Vol. 30, pp. 689-690; Vol. 34, p. 331; Pan American Union, *Law and Treaty Series*: No. 7, p. 6; No. 8, p. 6; Documents on International Affairs, 1937, p. 529; League of Nations, *Official Journal*, 1933, Part 1, p. 549.

⁸ Probably with the same end in view, Napoleon forced five neighboring principalities to refuse asylum to French émigrés; Austria and Russia in 1792, and Austria, Prussia, and Russia in 1834 made similar agreements among themselves.

and in the case of those of the Soviet Union with its border states and the United States.⁹

Obviously, conclusions concerning the requirements of international law must await an examination of the other sources; on the basis of the above review alone, it can hardly be said that enough states have agreed on any one obligation to transform it into a rule of international law.

INTERNATIONAL CUSTOM

A study of diplomatic exchanges concerning propaganda reveals wide differences of opinion as to the requirements of international law. Dealing in turn with the two questions posed in the introductory paragraph, we will first review the instances in which the existence of an obligation has been affirmed and then those in which it has been denied either in theory or in practice.

The existence of an obligation on the part of states not to spread propaganda in a friendly foreign country hostile to its government has frequently been affirmed. Although during the period of the French Revolution references to the requirements of international law in this connection were rare, the National Assembly itself proclaimed that France would not use propaganda against neighboring states even as a measure of reprisal,¹⁰ and, as an assumption basic to broader complaints, Austria and Prussia early indicated that they regarded official French propaganda as inadmissible; in the end, the development in France of a desire to lead other peoples to "liberty" through "armed propaganda" and the monarchical fear of revolutionary principles and the French example were major causes of the outbreak of war in 1792.¹¹ A somewhat similar development occurred in the

⁹ In paragraph 4 of the Soviet-American agreement, the U.S.S.R. declared that it would be its "fixed policy":

"Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which has as an aim the overthrow or the preparation for the overthrow of, or the bringing about by force of a change in, the political or social order of the whole or any part of the United States, its territories or possessions." (Exchange of Communications between President Roosevelt and M. Litvinoff, People's Commissar for Foreign Affairs, Nov. 16, 1933, this JOURNAL, Supp., Vol. 28 (1934), pp. 3-4.)

This clause is closely modeled after agreements made by the Soviet Union with most of its border states, the proper interpretation of which is also in doubt. In fact, the latter were not taken to require the suppression of, or restraint on, the activities of the Third International, and most of the contracting parties seem to have acquiesced tacitly in this interpretation. But whether the Soviet Union could rightly say that the interpretation given to these agreements was necessarily carried over to the agreement with the United States is doubtful, particularly when an opposite interpretation is so clearly supported by the text when studied in connection with official statements of the aims of the International.

¹⁰ *Archives parlementaires de 1787 à 1860* (1862-), Vol. 35, pp. 442-443; Vol. 36, p. 618.

¹¹ *Ibid.*, Vol. 42, pp. 217-218; J. Debrett (ed.), *A Collection of State Papers Relative to the War against France (1794-1802)*, Vol. 1, pp. 21, 28; A. R. von Vivenot (ed.), *Quellen zur Geschichte der deutschen Kaiserpolitik Oesterreichs während der französischen Revolutionskriege*,

relations between France and Great Britain. In May, 1792, Britain was informed that the French King would disavow any of his agents in friendly countries who sought to provoke revolt against the established order, for such action would be a violation of international law,¹² but in November of the same year the National Assembly issued a decree encouraging revolt abroad by providing that France would grant fraternity and aid to all peoples wishing to recover their liberty.¹³ Vigorous protests from England¹⁴ first induced the Executive Council to attempt to explain the decree away,¹⁵ and finally on April 13, 1793, led to its repeal; but before the latter occurred, war had been declared, brought on to some extent by the difficulties over propaganda.¹⁶

The repeal of the French decree took the form of a declaration of the National Convention "that it will not interfere in any way in the government of other powers."¹⁷ This principle secured the theoretical approval of the other states, but they gave it a curious interpretation. On the assumption that the mere example involved in establishing a non-monarchical government amounted to constructive interference in their affairs, these Powers (excepting England) claimed the right themselves to intervene. If this were not already clear, it was made explicit in the circular note transmitted by the Holy Alliance Powers following the conference at Troppau and designed to explain their grounds for suppressing the revolts in Naples and Piedmont:

The Powers are exercising an incontestable right in taking common measures in respect to those states in which the overthrow of the government through a revolt, even if it be considered simply as a dangerous example, may result in a hostile attitude toward all constitutions and legitimate governments.

And further, they quite consistently claimed that

the exercise of this right becomes an urgent necessity when those who have placed themselves in this situation seek to extend to their neighbors the ills which they have brought upon themselves and to promote revolt and confusion around them.¹⁸

1790-1801 (1883-1890), Vol. 1, pp. 470-474; Vol. 2, p. 378. Cf. J. H. Clapham, *The Causes of the War of 1792* (1889).

¹² *Archives parlementaires de 1787 à 1860*, Vol. 58, p. 133.

¹³ *Ibid.*, Vol. 53, p. 474.

¹⁴ W. T. Laprade, *England and the French Revolution* (1909), p. 106; Albert Sorel, *L'Europe et la Révolution française* (1889-1904), Vol. 3, pp. 226-227; Annual Register, Vol. 35 (1793), "State Papers," p. 117; *Papiers de Barthélemy, ambassadeur de France en Suisse 1792-1797* (1886-1910), Vol. 1, pp. 433, 436, 441.

¹⁵ *Archives parlementaires de 1787 à 1860*, Vol. 56, p. 104; Vol. 57, p. 14; Vol. 58, pp. 141, 152.

¹⁶ See King George's statement to Parliament, Jan. 28, 1793, in Annual Register, Vol. 35 (1793), "State Papers," p. 128. Laprade (*op. cit.*) builds a forceful case to show that the decree of Nov. 19, 1792, and the propaganda issue constituted an excuse rather than a reason for war.

¹⁷ *Archives parlementaires de 1787 à 1860*, Vol. 62, p. 3.

¹⁸ Robinson, *op. cit.*, p. 21.

But in the opinion of the British Government, these statements involved "an exception to general principles [which] never can, without the utmost danger, be so far reduced to rule as to be incorporated into . . . the institutes of the law of nations."¹⁹

Following the revolution of 1830 the French Government declared that it would "do nothing which might tend to disturb the domestic peace" of other states²⁰—a position which Metternich and others clearly felt that France was obliged to take²¹—and practically the same principle was enunciated by France after the revolution of 1848.²²

In the years before the World War the challenge to this principle by Serbia led first to a requirement in 1909 that it pledge to change its policy so as to live in the future with Austria-Hungary on the basis of good neighborly relations,²³ and then to the ultimatum of 1914 which brought on the war. In the latter, Austria-Hungary demanded that Serbia "repudiate all idea of interfering or attempting to interfere with the destinies of the inhabitants of any part whatever of Austria-Hungary"; that it "eliminate without delay from public instruction in Serbia . . . everything that serves or might serve, to foment the propaganda against Austria-Hungary"; and that it "remove from the military service, and from the administration in general, all officers and functionaries guilty of propaganda against the Austro-Hungarian Monarchy."²⁴ Moreover, as indicated below, additional demands were made with regard to the propaganda activity of private individuals and organizations. In reply, Serbia claimed that since 1909 it had not attempted to change the political and legal state of affairs in Bosnia and Herzegovina and therefore had nothing to repudiate, but did agree to the demand concerning public instruction and to the last demand named in so far as persons in the military service were concerned.²⁵ Both Austria and Serbia therefore accepted the position that governments must refrain from engaging in propaganda activities hostile to friendly foreign governments.

As already indicated, the extensive propaganda activity of the Soviet Government in the first few years of its existence brought such widespread protest that it was forced to make formal treaty pledges renouncing official

¹⁹ Great Britain, Foreign Office, British and Foreign State Papers (1841–), Vol. 8 (1820–1821), p. 1162.

²⁰ Richard Metternich-Winneburg (ed.), *Aus Metternichs nachgelassenen Papieren* (1880–1884), Vol. 5, p. 19.

²¹ *Ibid.*, pp. 18, 116, 122, 129, 173, 576; Eugène de Guichen, *La révolution de juillet 1830 et l'Europe* (1917), pp. 163, 179; François P. G. Guizot, *Mémoires pour servir à l'histoire de mon temps* (1858–1867), Vol. 4, p. 36.

²² Martens, *Nouveau recueil général* (1843–1875), Vol. 12 (1848), p. 69.

²³ M. Boghitchewitsch, *Die auswärtige Politik serbiens, 1903 bis 1914* (1928–1931), Vol. 2, p. 87.

²⁴ Great Britain, Foreign Office, Collected Diplomatic Documents Relating to the Outbreak of the European War (1915), pp. 5–8.

²⁵ *Ibid.*, pp. 506–514.

propaganda activity. Bela Kun's use of propaganda as head of the short-lived Communist régime in Hungary brought protests from Austria and Switzerland.²⁶ The National Socialist Government of Germany has on several occasions maintained that it does not spread political propaganda abroad,²⁷ and in July, 1936, it explicitly agreed with Austria that

Each of the two governments views the existing internal political structure in either State, including the question of Austrian National Socialism, as the internal affair of that respective State and agrees to refrain from attempting either directly or indirectly to interfere therewith.²⁸

As far as the United States is concerned, it has consistently maintained that governments must not spread propaganda hostile to friendly foreign governments. This principle was stated by President Jackson when, referring to Mexico, he declared that "any act on the part of the Government of the United States, which would tend to foster a spirit of resistance to her government and laws, whatever may be their character or form . . . would be unauthorized and highly improper."²⁹ And many decades later, the United States, asserting that the obligations of diplomatic intercourse "include . . . abstention from hostile propaganda by one country in the territory of the other,"³⁰ refused to recognize the Bolshevik Government until it gave guarantees that the principle would be observed.

With respect to radio propaganda directed from one country into the territory of another, numerous protests have been made, sometimes resulting in expressions of regret,³¹ sometimes in claims that the broadcasts were in fact directed toward listeners within the broadcasting country,³² and sometimes in denials of responsibility.³³ The very brief published reports concerning these diplomatic exchanges scarcely permit one to draw any conclusion concerning the attitude of the states involved toward the obligations imposed by international law.

As intimated, the principle that states must themselves refrain from spreading in a friendly foreign country propaganda hostile to its government has frequently been challenged, at least in practice. Soon after the outbreak

²⁶ Albert Kaas and Fedor de Lazarovics, *Bolshevism in Hungary* (1931), pp. 179-182.

²⁷ *New York Times*, Dec. 10, 1933, IV, 3:7; Jan. 24, 1938, 4:2.

²⁸ *Ibid.*, July 12, 1936, 20:2.

²⁹ *United States, Executive Documents, 1836-1837* [24th Cong., 2d sess., Serial 301], Vol. 1, Doc. 2, p. 58.

³⁰ American Foundation, Committee on Russian-American Relations, *The United States and the Soviet Union* (1933), p. 39. Letter from Charles Evans Hughes to Samuel Gompers, July 19, 1923.

³¹ See, for example, *New York Times*, March 30, 1939, 9:5.

³² *Ibid.*, Feb. 3, 1934, 6:3.

³³ See the example cited by W. A. Robson, "The Progress of Socialization in England," *Foreign Affairs* (N. Y.), Vol. 11 (April, 1935), p. 506.

of the French Revolution, Spain,³⁴ Sardinia,³⁵ the Elector of Trèves,³⁶ and Russia³⁷ were all engaged in, or were accomplices to propaganda activity hostile to France, and France officially spread propaganda hostile to other countries. In the early 1830's French government officials were accomplices to propaganda activity against friendly Italian governments,³⁸ and Cavour instigated revolutions designed to unite Italy.³⁹ The Tsarist Government was involved in the activities of the Hetairia in Greece from 1815 to 1820,⁴⁰ and acted openly in spreading propaganda in Bulgaria hostile to its government, particularly from 1880 to 1885.⁴¹ During the half-century preceding the Balkan wars, official Bulgarian, Greek, Rumanian, and Serbian propaganda competed in Macedonia to undermine the authority of the Ottoman Empire,⁴² and Serbia was for a time active in Bosnia-Herzegovina as well.⁴³ Propaganda activities of a minor sort against Soviet Russia have been engaged in by Great Britain⁴⁴ and the United States⁴⁵ (in each case prior to the granting of recognition), and the Soviet Government carried on an extensive official propaganda campaign over a period of several years designed to promote world revolution,⁴⁶ a campaign in which Communist Hungary contributed to the extent of its powers.⁴⁷ Similarly, in spite of official statements to the contrary, Nazi Germany has sought diligently to spread the

³⁴ Hermann Baumgarten, *Geschichte Spaniens zur Zeit der französischen Revolution* (1861), p. 338.

³⁵ Ernest Daudet, *Histoire des conspirations royalistes du Midi sous la Révolution (1790-1795)* (1881), pp. 155-156.

³⁶ *Ibid.*, p. 118.

³⁷ *Ibid.*

³⁸ C. Vidal, *Mazzini et les tentatives révolutionnaires de la Jeune Italie dans les états sardes (1853-1854)* (1927), pp. 10, 12; *idem*, *Louis-Philippe, Metternich et la crise italienne de 1831-1832* (1931), pp. 55-58.

³⁹ Paul Matter, *Cavour et l'unité italienne*, Vol. 3, 1856-61 (1927), pp. 198-199 and *passim*. Cavour's methods were described by Mussolini to the Chamber of Deputies in March, 1938, for the purpose of extenuating Hitler's conduct in Austria (New York Times, March 17, 1938, 6:3).

⁴⁰ George Finlay, *A History of Greece from Its Conquest by the Romans to the Present Time* (1877), Vol. 6, p. 100; Grégoire Yakshitch, *L'Europe et la résurrection de la Serbie (1804-1834)* (1917), p. 377.

⁴¹ R. Léonoff (ed.), *Documents secrets de la politique russe en Orient, 1831-1890* (1893) *passim*.

⁴² Luigi Villari (ed.), *The Balkan Question* (1905), pp. 138-141, 149, 157, 187, 195; H. N. Brailsford, *Macedonia: Its Races and Their Future* (1906), pp. 121, 188; H. W. V. Temperley, *History of Serbia* (1919), p. 257; L. von Südland, *Die südslawische Frage und der Weltkrieg* (1918), pp. 367-368. Cf. the treaties between Greece and Serbia, cited *supra*, note 3.

⁴³ Heinrich Friedjung, *Das Zeitalter des Imperialismus, 1884-1914* (1922), Vol. 2, pp. 204-209; Boghitchewitsch, *op. cit.*, Vol. 3, p. 27; B. E. Schmitt, *The Coming of the War, 1914* (1930), Vol. 1, pp. 120, 179, 182-183, and *passim*.

⁴⁴ Great Britain, *Parliamentary Debates (Official Report)*, 5th Ser. (1909-), Vol. 138, pp. 2043-2044.

⁴⁵ New York Times, Aug. 14, 1920, 1:6.

⁴⁶ See the statement of Chicherin in Nikolai Lenin and Leon Trotsky, *The Proletarian Revolution in Russia*, ed. by Louis C. Fraina (1918), p. 409.

⁴⁷ Kaas and Lazarovics, *op. cit.*, pp. 125, 179.

principles of National Socialism, particularly in neighboring countries.⁴⁸ It is important, however, that when pressed, none of these governments has claimed that its actions were based on right; on the contrary, when their activities have aroused serious protest they have uniformly recognized an obligation not to spread propaganda in a friendly foreign country hostile to its government.

The above facts give some justification for the conclusion that in spite of numerous violations, the principle that states are obliged to refrain from spreading propaganda in a friendly foreign country hostile to its government is, in international custom, "accepted as law."⁴⁹

The existence of an obligation on the part of states to use due diligence to prevent private individuals and organizations from spreading propaganda from their territory hostile to friendly foreign governments has also been affirmed frequently in diplomatic exchanges. As a rule no clear distinction between public and private activities was made during the period of the French Revolution, but it is plain that the Austrian position was that the French Government, which tolerated and even encouraged private activities,⁵⁰ was obliged to prevent them.⁵¹ This position was also taken by Switzerland,⁵² and the principle was championed by Napoleon when, in a dispute with England in 1802, he asserted that a "general maxim of the law of nations" obliged governments not only to prevent all activities designed to promote revolution in other countries, but also to "prevent, repress, and punish every attack which might [by means of the press] be made against the rights, the interests, and the honour of foreign powers."⁵³ Although rejected by Britain both in 1802 and later, practically the same position was taken, following the Congress of Vienna, by Austria, Prussia, and Russia,

⁴⁸ This statement is based on the assumption that the government is responsible for the actions of the Nazi party—in view of the fact that they have been legally united—and for press and radio utterances, in view of the fact that they are strictly controlled. Cf. Lawrence Preuss, "International Responsibility for Hostile Propaganda against Foreign States," this JOURNAL, Vol. 28 (1934), esp. pp. 666-667.

⁴⁹ Note should be made of the fact that this statement refers to the spreading of propaganda *within foreign countries*. Governments are free in certain circumstances to issue and circulate within their own territory pronouncements which other governments regard as hostile to their interests (for instance, a declaration that another government is guilty of aggression), but, aside from releasing the news via the radio and press, it is doubtful whether direct, official steps could legally be taken to make a foreign people cognizant of such pronouncements, unless it be done as a measure of reprisal. The latter basis for action would probably exist in connection with the illustration cited in view of the obligations of the Pact of Paris and other instruments. On this question see Quincy Wright, "The Denunciation of Treaty Violators," this JOURNAL, Vol. 32 (1938), pp. 526-535.

⁵⁰ See especially *Papiers de Barthélemy*, Vol. 1, pp. 4-5; Albert Sorel, "Un Général diplomatique au temps de la Révolution. I. Dumouriez aux affaires étrangères," *Revue des deux mondes*, Vol. 64 (1884), pp. 310-311.

⁵¹ See especially Vivenot, *op. cit.*, Vol. 1, pp. 376, 568.

⁵² *Papiers de Barthélemy*, Vol. 1, pp. 433, 436, 441.

⁵³ Annual Register, Vol. 45 (1803), "State Papers," p. 661.

as indicated by their policy toward Italy and Spain and by the obligations which they forced Switzerland, France, and the Free City of Cracow to accept. In 1823 Switzerland was compelled to issue a decree denying asylum to political refugees, prohibiting any foreigner from engaging in propaganda or other activities hostile to foreign governments, and forbidding the publication of any material offensive to them.⁵⁴ After the July revolution in 1830, the three autocratic Powers insisted that France must not permit the use of its territory as a base for spreading hostile propaganda abroad, the latter country admitting that the demand was in conformity with the requirements of international law.⁵⁵ Finally, Cracow was forced to insert in its constitution a provision calling for the punishment of all subversive acts directed against any of the three Powers just as if they had been directed against Cracow itself.⁵⁶

Following the revolutions of 1848, responsibility for private propaganda activities was imputed by Austria, France, Prussia, and Russia to England⁵⁷ and Switzerland;⁵⁸ and at the Paris Conference of 1856 France raised complaints against Belgium.⁵⁹ Switzerland was forced again to acknowledge the obligation, and Belgium soon passed a law in which penalties were fixed for revolutionary activities directed against foreign governments,⁶⁰ but England explicitly denied any responsibility.⁶¹ Bismarck invoked the principle in his disputes with France and Belgium over the activities of Catholic bishops from 1873 to 1878, asserting as an "incontestable principle of international law that a state may not permit its nationals to disturb the domestic peace of another state,"⁶² but his claim was not admitted. Austria maintained that Serbia's pledge of March 31, 1909, involved such an obligation, and in her ultimatum of July, 1914, demanded that in addition to giving assurances concerning its own behavior, the government condemn all propaganda against Austria-Hungary and announce that it would rigorously prosecute persons engaged in spreading it; this applied not only to propaganda spread abroad but also to all material published in Serbia. To these demands Serbia substantially agreed.⁶³ It should be noted, however, that neither country referred in this connection to the requirements of international law.

⁵⁴ Anton von Tiliier, *Geschichte der Eidgenossenschaft während der sogenannten Restaurationsepoche* (1848-1850), Vol. 2, p. 257, n. 1.

⁵⁵ Guizot, *op. cit.*, Vol. 4, p. 36; *Archives parlementaires de 1787 à 1860*, Vol. 81 (March 26, 1833), p. 615; Vol. 82 (March 30, 1833), pp. 33-34, 36.

⁵⁶ Martens, *Nouveau recueil général*, Vol. 10 (1846), p. 133.

⁵⁷ Br. and For. State Papers, Vol. 42 (1852-1853), pp. 402, 410-411, 415-416, 418-419, 425.

⁵⁸ Martens, *op. cit.*, Vol. 11 (1847-1848), pp. 142-149, 156; Vol. 14 (1843-1852), p. 561.

⁵⁹ Br. and For. State Papers, Vol. 46 (1855-1856), pp. 124-125.

⁶⁰ Paul Servais, *Les codes et les lois spéciales les plus usuelles en vigueur en Belgique* (1937), "Law of March 12, 1858," Art. 3, p. 285.

⁶¹ Br. and For. State Papers, Vol. 42 (1852-1853), pp. 422-423.

⁶² *Archives diplomatiques (1861-1914)*, 1876, Vol. 2, p. 298.

⁶³ Collected Diplomatic Documents, pp. 506-514.

Since the World War, imputations of responsibility for private propaganda activity have been made to Soviet Russia by the United States, on the basis of the agreement of 1933, and by other states, sometimes without special reference to treaty obligations.⁶⁴ Yugoslavia has secured the suppression of propaganda groups in Germany,⁶⁵ and the Soviet Union and Poland both protested to Czechoslovakia against its toleration of activities directed against them.⁶⁶ Japan has leveled similar charges against China,⁶⁷ and over many years a number of states have protested against toleration of propaganda activities by the United States, more or less on the basis of a claim of right.⁶⁸ Most explicit of all the protests published recently was that sent by the German Government to the Governing Commission of the Saar Territory in February, 1934. Alleging that the propaganda activities of refugees carried on within the Saar had made the territory "simply a base for political operations against Germany," the Foreign Minister declared that "this situation [is] incompatible with the generally recognized principles of international law. . . ." ⁶⁹

In contrast to the above, Spain, Sardinia, and the Elector of Trèves tolerated private propaganda against the French revolutionary government, and France followed the same policy with regard to private propaganda directed against other countries. As indicated, Russia from 1815 to 1820 even encouraged such propaganda on the part of the Hetairia. Again, for a short time after the revolution of 1830, France, and at various times Switzerland, permitted similar activities. In the winter of 1851-1852, Great Britain explicitly denied any obligation with regard to private propaganda,⁷⁰ and France and Belgium tacitly did the same in connection

⁶⁴ New York Times, Sept. 4, 1935, 15:6. As a rule, however, states imputing a responsibility to the U.S.S.R. for acts of the Communist International allege that it is connected in one way or another with the government.

⁶⁵ R. W. Seton-Watson, "King Alexander's Assassination: Its Background and Effects," *International Affairs*, Vol. 14 (1935), p. 30.

⁶⁶ New York Times, Apr. 4, 1938, 1:2; May 7, 1938, 5:6; July 29, 1938, 6:5; Dec. 19, 1938, 1:5; Dec. 20, 1938, 26:3; Jan. 12, 1939, 12:6.

⁶⁷ League of Nations, Appeal from the Chinese Government in Virtue of Article 15 of the Covenant, Explanatory Note Communicated by the Japanese Government (Geneva, March 2, 1932; Official No. A. Extr. 6. 1932. VII).

⁶⁸ For example, see United States Department of State, *Papers Relating to the Foreign Relations of the United States* (1852-), 1911, pp. 392-393.

⁶⁹ League of Nations Official Journal, Vol. 15, Part 1 (No. 5, 1934), "Fifty-seventh Periodical Report of the Governing Commission," p. 459.

⁷⁰ *Supra*, note 61. In 1928, however, the British Government requested Prince Carol to leave the country when it appeared that he intended to send to Rumania by aeroplane copies of a manifesto printed in London in which he urged the ousting of King Michael and his own recall to the throne. It is probable that this action was taken for purely political rather than legal reasons; the Home Secretary in Parliament ignored a question concerning the requirements of international law (*Parl. Debates*, Vol. 217, pp. 175, 390, May 8 and 10, 1928; *London Times*, May 8, 1928, 16:1; May 9, 1928, 16:1).

with Bismarck's protests in the 1870's. Russia and Serbia especially gave free reign to private activities in the Balkans. Great Britain, The Netherlands, and Switzerland permitted the First International to operate from their territory with considerable freedom,⁷¹ and the countries which took repressive measures against it did so more out of national considerations than in fulfillment of any international obligation.⁷² Most of the countries of Central and Western Europe permitted the Second International to conduct its activities freely, and Austria, France, Germany, Great Britain, Sweden, and Switzerland were all bases for the operations of the Russian revolutionaries seeking to overthrow the Tsar.⁷³ The Soviet Union has steadfastly maintained that it is not responsible in any way for private propaganda activities, as represented by the program of the Third International, and, with a few exceptions, other states have acquiesced in its position. Nazi Germany has permitted propaganda activities of a private nature, and Czechoslovakia, Great Britain, the United States, and other countries have tolerated the spreading of propaganda from their territory into Germany.⁷⁴ It is a fixed policy of the United States to deny any obligation to prohibit private propaganda activities; generally the plea has been that the laws permit no other course, but on at least one occasion, involving a protest from Mexico concerning the propaganda which Madero was sending across the border from Texas, the Secretary of State declared explicitly that "the mere carrying on of a revolutionary propaganda by writing or speaking does not constitute an offense against the law of nations. . . ."⁷⁵

It may, therefore, be said that the principle that states must use due diligence to prevent the use of their territory as a base for the spreading of propaganda hostile to foreign governments has never, in general practice, been accepted as law. Most of the countries of Europe, but not all, accepted it during the first half of the last century, and on occasion states have upheld it since that time, but practice has not been sufficiently uniform to establish a positive rule of law.

THE GENERAL PRINCIPLES OF LAW

In order to determine what principles of law relative to propaganda activities are generally recognized, the writer has examined the penal codes

⁷¹ G. M. Stekloff, *History of the First International* (1928), *passim*.

⁷² *Archives diplomatiques* (1874), Vol. 3, esp. pp. 86, 204, 212, 242-243, 251; Otto Fürst von Bismarck, *Gedanken und Erinnerungen* (1898), p. 569; F. F. Count von Beust, *Memoirs* (1887), Vol. 2, p. 273.

⁷³ N. N. Popov, *Outline History of the Communist Party of the Soviet Union* (1934), Vol. 1, pp. 102, 136, 184, 236, 269, 281.

⁷⁴ See, for instance, the report concerning the British National Council of Labor's manifesto to the German people in the *New York Times*, July 2, 1939, 1:1.

⁷⁵ U. S. Foreign Relations, 1911, p. 398.

or special legislation of 49 countries,⁷⁶ the common law of Great Britain and the United States, the press laws of these countries as compiled by the British Foreign Office,⁷⁷ and their diplomatic and consular laws as compiled by Professors Feller and Hudson.⁷⁸ The results of this investigation will be presented by dealing first with laws relating to libel and then with those relating to other offenses.

Of the 51 states whose legislation was studied, 28 give protection from libel to foreign sovereigns or heads of states, 3 protect sovereigns only, and the remaining 20 ignore the subject altogether. Of the 7 Great Powers Japan and the Soviet Union apparently give the heads of foreign states no protection at all from libel;⁷⁹ Germany gives protection to sovereigns, but not to presidents of republics;⁸⁰ and Great Britain and the United States in the common law (enforceable in American State courts, but not in the Federal courts), apparently grant protection only if the libel involves a

⁷⁶ The countries included in this list, together with the date of publication of the material studied, are as follows:

Afghanistan, 1928	Egypt, 1936	Panama, 1932
Argentina, 1922	Finland, 1890	Paraguay, 1914
Austria, 1852	France, 1934	Peru, 1927
Belgium, 1937	Germany, 1938	Poland, 1932
Bolivia, 1923	Guatemala, 1932	Portugal, 1903
Brasil, 1929	Haiti, 1914	Rumania
Bulgaria, 1896	Honduras, 1906	Salvador, 1904
Canada, 1939	Hungary, 1910	Siam, 1908
Chile, 1937	Italy, 1930	Spain, 1934
China, 1935	Japan, 1936	Sweden, 1895
Colombia, 1934	Latvia, 1934	Switzerland, 1938
Costa Rica, 1924	Lithuania, 1903 (Russian	Turkey, 1926
Cuba, 1922	code)	U.S.S.R., 1934
Czechoslovakia (Law of 1933)	Mexico, 1938	Uruguay, 1889
Denmark, 1901	Netherlands, 1883	Venezuela, 1928
Dominican Republic, 1926	Nicaragua, 1891	Yugoslavia (Serbia), 1911
Ecuador, 1889	Norway, 1902	

Special statutes concerning this topic were found in the legislation of Czechoslovakia and France. The Rumanian penal code was not available, but that country is included in this compilation in view of the fact that press laws which were available seem to cover the subject.

⁷⁷ The Press Laws of Foreign Countries (1926).

⁷⁸ A. H. Feller and Manley O. Hudson (eds.), A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries (1933).

⁷⁹ Japan grants special protection if the foreign sovereign or president is within its jurisdiction (W. J. Sebald [tr.], the Criminal Code of Japan [1936], p. 67, Art. 90). For the Russian penal code see Great Britain, Foreign Office, The Penal Code of the Russian Socialist Federal Soviet Republic. Text of 1926, with amendments up to December 1, 1932 (1934).

⁸⁰ Otto Schwarz, *Strafgesetzbuch mit allen wichtigen Nebengesetzen und Verordnungen* (1936), p. 174, Art. 103 and comment thereon. The draft German penal code of 1925 proposed to eliminate the discrimination between foreign sovereigns and other heads of states, but then, following the Japanese practice, to grant protection to such persons only when they are in Germany (*Amilicher Entwurf eines allgemeinen deutschen Strafgesetzbuchs nebst Begründung. Veröffentlicht auf Anordnung des Reichsjustizministeriums* [1925], pp. 14-15, Art. 111).

threat to the public peace.⁸¹ Only France⁸² and Italy⁸³ appear willing⁸⁴ to grant thorough protection. On the basis of these facts, the conclusion can hardly be drawn that municipal laws reveal deference for any principle of international law requiring the protection of the heads of foreign states from libel.

Thirty-seven of the 51 states, on the other hand, give special protection from libel to resident foreign diplomats, and presumably many if not all of the others grant them the same protection as is afforded to private individuals (a course which is followed by both Great Britain and the United States). The tentative conclusion may therefore be drawn that protection of resident foreign diplomats from libel is so generally afforded by municipal law as to indicate a response to a requirement of international law. That special protection is necessary, however, does not seem to be indicated.⁸⁵

One state grants protection to other states as such, three to foreign governments, five to heads of governments, and the common law of Great Britain and the United States, as indicated, permits prosecution for any libel, but only if it involves a threat to the peace.

It appears, therefore, that if any general principle is established in connection with libel, it is that protection be afforded to resident foreign diplomats.

In connection with offenses other than libel, an examination of the same material leads to the conclusion that states may be divided into four categories. In the first are the few which grant, or on the basis of reciprocity are willing to grant, protection to foreign countries against certain hostile propaganda activities. Most noteworthy in this group is Germany, whose penal code, after defining treasonable acts, stipulates that other countries also shall be protected from them if reciprocal treatment is accorded.⁸⁶ In the second category are some 27 states which provide penalties for activities which endanger existing peaceful relations with other states. One provision of this kind calls for the punishment of individuals for acts which expose the state to a declaration of war or its citizens to reprisals, and is found in the

⁸¹ *King v. Gordon*, 22 Howell's State Tr., esp. pp. 233-234; *King v. Vint*, 27 *ibid.*, esp. p. 641; *King v. Peltier*, 28 *ibid.*, esp. pp. 617-618; "Trial of William Cobbett for Libel. In the Supreme Court of Pennsylvania. November, 1797," Wharton State Tr., esp. p. 325. In the case of *King v. Antonelli and Barberi* (1906) (70 J. P. 4), the British court ruled that the common law does not afford protection to foreign governments or sovereigns against seditious libel, but referred approvingly to the earlier decisions on criminal libel.

⁸² Henry Bourdeaux (ed.), *Les codes d'audience Dalloz*, 20th ed. (1934), p. 371, Art. 36 of the law of July 29, 1881.

⁸³ Great Britain, Foreign Office, Penal Code of the Kingdom of Italy (1931), p. 84, Art. 297.

⁸⁴ The Italian law applies only "in so far as the foreign law guarantees, reciprocally, to the Head of the Italian State . . . equality of penal protection." The German code contains a similar stipulation.

⁸⁵ This latter conclusion is also reached by J. S. Reeves (Reporter), "Diplomatic Privileges and Immunities," this JOURNAL, Supp., Vol. 26 (1932), p. 94.

⁸⁶ Dr. Daleke, *Strafrecht und Strafverfahren*, 30th ed. (1938), pp. 86-87, Art. 102. Cf. the Belgian law, cited *supra*, note 60.

penal codes of France,⁸⁷ Spain,⁸⁸ and a number of other states. Another is of the type enacted by Switzerland⁸⁹ in 1934 providing for the suspension of "newspapers and periodicals which, exceeding the limits of criticism in a particularly grave manner, threaten to disturb the good relations of Switzerland with other states."⁹⁰ In the third category are the Soviet Union, which prohibits only counter-revolutionary activity against any "toilers' state" even if it is not a part of the U.S.S.R.,⁹¹ and a number of states which grant special protection to their allies in war. Finally, in the fourth group are the remaining states, including Great Britain, Japan, and the United States, whose common law or penal codes grant no protection at all to foreign states against hostile propaganda activity.

It is, therefore, obvious that the attitudes which states express in national legislation toward offenses other than libel vary so widely as to present only negative evidence concerning the requirements of international law.

OPINIONS OF WRITERS

Publicists agree that governments are bound not to spread propaganda in a friendly foreign country hostile to its government. Thus Stowell is of the opinion that calling on the subjects of a foreign state to revolt "is a violation of the sovereign rights of a friendly state . . .";⁹² and Martens writes that "each state has a right to require that foreign powers shall not incite the people of its territory to rise against it."⁹³ Far from there being any challenge to this principle, some of the earlier writers even went farther, suggesting that states must not even establish a government on the basis of principles hostile to other governments⁹⁴—a position which is now generally rejected.⁹⁵

⁸⁷ Arts. 84 and 85. It is doubtful, however, whether these articles could be invoked solely because of propaganda activities which lead to diplomatic complications. See S. Rapoport, "Atteints et complots contre la sûreté de l'Etat," *Répertoire de droit international*, Vol. 2 (1929), pp. 237-239.

⁸⁸ Code of 1932, Art. 134.

⁸⁹ India, Italy, Sweden, and several other countries also have legislation of this kind.

⁹⁰ *Feuille fédérale*, 86^e année, 1934, Vol. 1, p. 867. Switzerland has in fact acted against the publication within its own borders of propaganda hostile to foreign governments, as indicated by its expulsion of at least two alien journalists (London Times, March 13, 1934, 13:7; *Journal des Nations* [Geneva], Dec. 15, 1936; Jan. 11, 14, 16, 23, 25, 1937; March 2, 1937), and by its application of the law quoted in connection with the *Journal des Nations* and other Swiss papers (London Times, Feb. 7, 1936, 13:4; New York Times, Oct. 8, 1938, 9:2).

⁹¹ Art. 58 of the code of the R.S.F.S.R., cited *supra*, note 79.

⁹² E. C. Stowell, *Intervention in International Law* (1921), p. 378.

⁹³ F. F. Martens, *Traité de droit international* (1883-1887), Vol. 1, sec. 74. Cf. M. de Vattel, *Le droit des gens* (1916), Bk. 2, ch. 4, sec. 56; P. Pradier-Fodéré, *Traité de droit international public européen et américain* (1885-1906), Vol. 1, sec. 238; W. E. Hall, *A Treatise on International Law* (1924), p. 339, sec. 91.

⁹⁴ See, for instance, Sir Robert Phillimore, *Commentaries upon International Law*, 3d ed. (1879-1889), Vol. 1, sec. 394; T. Funck-Brentano and Albert Sorel, *Précis du droit des gens* (1877), p. 216.

⁹⁵ See, for instance, Hall, *op. cit.*, pp. 339-340. At Cannes in 1922 the Supreme Council adopted a resolution declaring:

With respect to the existence of an obligation to prevent individuals from spreading propaganda abroad hostile to friendly foreign governments, writers have not been so clear or unanimous. Many of the earlier writers made broad statements to the effect that each state was obliged to prevent those subject to its jurisdiction from engaging in activities injurious to other governments or in plots or propaganda which might disturb the public peace in other countries. For instance, Rivier declared, "States have the right to require of any State which . . . permits enemies of public order to make of its territory a *foyer* of conspiracy or propaganda against them that it . . . suppress their operations."⁹⁶ During the last several decades, however, the tendency has been to reject such principles and to absolve governments from any responsibility for private propaganda activities. Hall evidenced this tendency by taking the view that a state has a right "to live its own life in its own way" as long as it does not lend "the shelter of its independence to persons organising armed attack upon the political or social order elsewhere established,"⁹⁷ and later Gemma expressed the opinion that "no responsibility whatever" can fall on a government for private propaganda activities.⁹⁸ This view is especially emphasized by those few writers who have paid particular attention to the problem.⁹⁹

Writers who deal with the question of protecting foreign states and their officials from libel generally impute a measure of responsibility to governments. Thus Dickinson refers to "the existence of an international obligation to protect foreign governments locally against defamations."¹⁰⁰ On the other hand, Oppenheim, after listing a series of actions which violate the dignity of states, including libel and slander on their heads, suggests that "while a Government of a State, its organs, and its servants are bound in this

"Nations can claim no right to dictate to each other regarding the principles on which they are to regulate their system of ownership, internal economy, and government. It is for every nation to choose for itself the system which it prefers in this respect."

⁹⁶ Alphonse Rivier, *Principes du droit des gens* (1896), Vol. 1, No. 52, p. 266, sec. 20. Cf. Carlos Calvo, *Le droit international théorique et pratique* (1896), Vol. 3, sec. 1298; Heinrich Triepel, *Völkerrecht und Landesrecht* (1899), p. 340; Paul Fauchille, *Traité de droit international public* (1922), Vol. 1, secs. 255, 441 (24), and 472; L. Oppenheim, *International Law*, 4th ed. (1928), Vol. 1, sec. 316.

⁹⁷ Hall, *op. cit.*, p. 50, sec. 7; cf. p. 269, sec. 65.

⁹⁸ Scipione Gemma, "*Les gouvernements de fait*," *Recueil des Cours de l'Académie de Droit International* (1924), Vol. 3, p. 365.

⁹⁹ H. Lauterpacht, "Revolutionary Activities by Private Persons against Foreign States," this JOURNAL, Vol. 22 (1928), pp. 105-130; *idem*, "Revolutionary Propaganda by Governments," Transactions of the Grotius Society, Vol. 13, Problems of Peace and War (1928); Preuss, *loc. cit.*, pp. 649-668. The work of these writers is reflected in both the fourth and fifth editions of Oppenheim's International Law.

¹⁰⁰ E. D. Dickinson, "The Defamation of Foreign Governments," this JOURNAL, Vol. 22 (1928), p. 844. Cf. E. C. Stowell, "Respect Due to Foreign Sovereigns," this JOURNAL, Vol. 31 (1937), pp. 301-302.

matter by rigid duties of respect and restraint, it is doubtful whether a State is bound to prevent its subjects from such acts. . . ." ¹⁰¹

CONCLUSION

The conclusion to be drawn from the above review is that a state is bound under international law to refrain from spreading propaganda in a friendly foreign country hostile to the latter's government, but that aside from special treaty provision it is under no responsibility with respect to private propaganda activities proceeding from its territory. This conclusion is directly upheld by the evidence presented in connection with the study of the practice of states and by the opinions of more recent writers, and it is in harmony with the evidence presented in connection with the study of international conventions and the general principles of law accepted by civilized nations.

¹⁰¹ L. Oppenheim, *International Law*, 5th ed. (1937), Vol. 1, pp. 230-231. Cf. *idem*, *International Law* (1912), Vol. 1, p. 222; also Phillimore, *op. cit.*, Vol. 2, sec. 103, p. 129.

THE WILHELMINA

AN ADVENTURE IN THE ASSERTION AND EXERCISE OF AMERICAN TRADING RIGHTS DURING THE WORLD WAR

BY JOHN C. CRIGHTON

Instructor in American History, Stephens College

I. THE SHIPMENT

Trading in grains was light, price fluctuations small, on the St. Louis Merchants Exchange during the Saturday session, January 23, 1915. The brokers, as they stood in small groups around the sample bins and the quotation boards, had opportunity to discuss the sensational venture on which one of their Exchange members had embarked.¹ The newspapers that morning carried the story that the W. L. Green Commission Company, one of the oldest and most respected firms on the Exchange, had the day before shipped a cargo of foodstuffs on board the steamship *Wilhelmina* from New York, bound for Hamburg. This was reported to be the first food shipment from America to Germany since the war began, and would furnish a test case involving the British "blockade."²

Before the war the W. L. Green Commission Company had been one of the largest exporters of grain in the country, with an extensive business in Germany. The war cut off entirely this German export outlet. There is no evidence that prior to March, 1915, the British actually seized and confiscated foodstuffs shipped from the United States directly to the Central Powers; but by their policy of diverting into British ports foodstuffs in sea transit to the Continent when the war broke out,³ and detaining grain and meat cargoes shipped after August 4, 1914, to the Scandinavian neutrals,⁴ they appear to have successfully discouraged direct export to Germany. This restrictive policy acted as a protective tariff on the German foodstuffs market, until by January, 1915, it was reported that wheat was about \$1 a bushel higher in Hamburg than in New York City.⁵

Two motives seem to have prompted Mr. Marshall Hall, President of the W. L. Green Commission Company, in making the trial shipment to Germany: first, the handsome profit (in the neighborhood of \$100,000 net) which

¹ Mr. Marshall Hall to Mr. W. T. Brooking, Jan. 23, 1915. *Wilhelmina Correspondence*.

² *St. Louis Globe-Democrat*, Jan. 23, 1915, 3:3. See also the memorandum from Ambassador von Bernstorff to the Secretary of State, Apr. 4, 1915, *Foreign Relations of the United States*, 1915, Supp., p. 157.

³ The North American Export Grain Association to the Secretary of State, Aug. 12, 1914. *Ibid.*, 1914, Supp., p. 304.

⁴ Armour and Co. to the Secretary of State, Dec. 1, 1914. *Ibid.*, p. 349 ff.

⁵ *St. Louis Globe-Democrat*, Jan. 23, 1915, 3:3.

Further, when Count von Bernstorff conferred with Secretary Bryan on February 13, he

made it clear to the State Department that he regards the issues involved in the case of the *Wilhelmina* as absolutely fundamental and at the bottom of all the threatened difficulties over American trade with either of the belligerents. He set forth plainly the view of Germany that Great Britain, by partially closing the North Sea to neutrals, and by announcing repeatedly an intention to starve out Germany, had gone beyond all the laws of warfare and civilization and had justified, therefore, such retaliation as Germany might find it convenient to undertake.²⁶

Finally, the German Secretary of State for Foreign Affairs, in reply to the "strict accountability" note of the United States, referred to the fact that "the American ship *Wilhelmina* was recently brought into port by England although her cargo was destined solely for the civil population of Germany"; and concluded with the threat that

if England invokes the powers of famine as an ally in its struggle against Germany with the intention of leaving a civilized people the alternative of perishing in misery or submitting to the yoke of England's political and commercial will, the German Government are today determined to take up the gauntlet and to appeal to the same grim ally.²⁷

The question whether the British food blockade was cause or merely pretext for the submarine warfare against merchant ships is one of the intriguing riddles of the history of the World War.²⁸ At least it is clear that in

²⁶ St. Louis Globe-Democrat, Feb. 14, 1915, I, 1:6.

²⁷ The German Minister for Foreign Affairs to the Ambassador in Germany, Feb. 16, 1915. Foreign Relations, 1915, Supp., p. 113.

²⁸ The most extensive and authoritative discussion of this problem is found in The German Submarine War, 1914-1918, by R. H. Gibson and Maurice Prendergast (London, 1931). The authors, well-known English naval critics, in Chapter II of their important work, take up the question: "When did the idea of a war on commerce, waged by submarines, first present itself to the Germans?" Their conclusion appears to be that Germany had made no preparations for employing submarines against enemy commerce prior to the outbreak of the war in 1914. The German Naval Prize Regulations, in harmony with international law, provided that captured vessels could be sunk only if it was impossible to bring them into port, and then only after passengers and crew had been placed in safety.

During the fall and winter of 1914 there occurred a number of sinkings of enemy merchant vessels by German submarines. On Oct. 20, 1914, Commander Feldkirchner in U-17, stopped and scuttled the steamer *Ghita*. Likewise, on Oct. 26, off Cape Grisnez, the French steamer *Amiral Ganteaume*, laden with Belgian refugees, was torpedoed with the loss of 40 lives in the panic that ensued. But it appears that these were isolated acts of lawlessness by German submarine commanders, not in line with any settled admiralty policy. When Feldkirchner returned to his base in U-17, he feared a reprimand for the *Ghita* incident. Instead, his action was formally approved, and a submarine warfare on British shipping began to be advocated in German admiralty circles. On Dec. 23, 1914, Admiral von Tirpitz, in an interview with the American newspaper correspondent, Mr. Karl von Wiegand, sent up the famous submarine "trial balloon." It was not until Feb. 4, 1915, on the occasion of the Kaiser's inspection of the fleet at Wilhelmshaven, that he was

its diplomatic representations the German Government regarded its war zone decree as a justified reprisal.

IV. IN PRIZE COURT

Shortly after her departure from New York on January 22, the steamship *Wilhelmina* ran into rainy weather. Then she struck storms, with mountainous seas crashing over her, destroying her wheelhouse and deckhouse and carrying away some of her lifeboats. Finally, on February 9, she limped into Falmouth, badly in need of repairs. She came in of her own accord, without molestation on the high seas by British cruisers.²⁹

The British put an armed customs guard on board, and notified Captain Brewer that the *Wilhelmina* must discharge her cargo at Sharpness after a seaworthy certificate was obtained.³⁰ The captain, a quick-witted Irishman, replied that he had orders to take the ship to Hamburg and he would unload her cargo there and nowhere else. The line of action followed by the *Wilhelmina*'s sponsors was to defeat all efforts of the British to discharge and requisition the cargo, forcing the government either to permit the *Wilhelmina* to continue its voyage to Hamburg or to institute prize court proceedings against it. The Americans wanted a clear-cut decision regarding their right to send food to the civilian population of Germany. It was announced in London on February 10 that the British Foreign Office had decided that the cargo of the *Wilhelmina* must go through a prize court,³¹ though the writ instituting prize court proceedings was not issued until February 27.³²

We must not neglect to mention the odyssean voyaging of Mr. Brooking, who left New York on the *Potsdam*, January 26. The first four days out were fine, then it stormed, with a gale of nearly 100 miles an hour and the ship tossing violently from side to side. As Mr. Brooking expressed it: "Half the night I slept on the north wall of my cabin, the other half on the sharp edge of my bunk."³³ By February 1 he was off Dover, waiting for the

persuaded, against his serious misgivings, to sign the submarine order against merchant shipping.

The facts then seem to be that the German U-boat warfare against commerce was not planned prior to the war's outbreak; that the first sinkings of merchant vessels before February, 1915, did not correspond to a definite policy of the German Government; finally, that the German Government did not embark on its unrestricted submarine warfare until England had practiced and openly announced its starvation blockade.

²⁹ The New York Times, Feb. 11, 1915, 2:4.

³⁰ Memorandum re cargo on S.S. *Wilhelmina*, p. 3. *Wilhelmina* Correspondence.

³¹ The New York Times, Feb. 11, 1915, 2:4.

³² The British Prime Minister to the American Ambassador, Apr. 8, 1915. *Foreign Relations*, 1915, Supp., p. 363.

³³ Mr. Brooking to the W. L. Green Commission Company, Feb. 2, 1915, *Wilhelmina* Correspondence. This was likely the same stormy weather that almost wrecked the *Wilhelmina*.

fog to lift so that the ship could continue to Rotterdam. On this day he got hold of a London newspaper and read eagerly the long article about the *Wilhelmina*, from which he received the impression that henceforth Britain would consider all foodstuffs bound for the Central Powers as absolute contraband.³⁴

From his port of landing Mr. Brooking went to Berlin where he conferred with Ambassador Gerard and Foreign Minister von Jagow. Von Jagow gave him a guarantee, certified to by Ambassador Gerard, that the cargo of the *Wilhelmina*, as well as the cargoes of future vessels arriving from America with foodstuffs, should not be subject to seizure, selling right nor any other government interference under the measures relating to the conservation of domestic grains; and that food imported from the United States should not be used, immediately or ultimately, for army, navy, or other governmental purposes.³⁵

Armed with this declaration Mr. Brooking on February 21 started for England to do battle in the prize courts. No Dutch passenger vessels were sailing, due to uncertainty as to the scope of the German U-boat operations which had begun four days before. Mr. Brooking stowed away on a small Dutch freighter of the Zeeland line and thus got across to Tilbury.³⁶ Later in London he joined Mr. Arthur Garfield Hays, of the firm Hays, Kaufmann and Lindheim, in preparation of the legal defense of the *Wilhelmina's* cargo.

The *Wilhelmina* case was never formally heard in prize court. The British, faced with the hard choice of either releasing the ship with its cargo

³⁴ Mr. Brooking to the W. L. Green Commission Company, Feb. 2, 1915. *Ibid.*

³⁵ Mr. Brooking to Mr. Hall, Feb. 19, 1915, *Wilhelmina* Correspondence. Mr. Brooking was very favorably impressed by the evidences of Germany's military and industrial efficiency. Trains, he explained, were running on schedule, food was cheap and fairly plentiful, and Germany still had immense reserves of man power. Asking Mr. Gerard if he thought Germany could win the war, he received the reply: "Don't ask me how Germany could win, but how could she possibly lose."

There is no specific corroboration in Ambassador Gerard's correspondence of this interview with Mr. Brooking. But we know from his letters to Colonel House that the statement attributed to him represented Gerard's convictions as to the outcome of the war. On Feb. 15, 1915, he wrote to House as follows: "Make no mistake, they (the Germans) will win on land and probably get a separate peace from Russia, then get the same from France or overwhelm it, and put a large force in Egypt, and perhaps completely blockade England." Charles Seymour, *The Intimate Papers of Colonel House* (Boston, 1926), Vol. I, p. 376. Throughout October and November of the same year he continued to express to House his belief in an ultimate German victory. *Ibid.*, Vol. II, p. 81.

³⁶ Mr. Brooking to Mr. Hall, Feb. 20, 1915, *Wilhelmina* Correspondence. The manager of the Zeeland line in Flushing gave Brooking a tip about crossing on one of the company's cargo boats. Near midnight on Feb. 20 Brooking stole aboard the *Königin Wilhelmina* (strange coincidence in names!). When in the morning the captain discovered and berated him, Brooking took the ship's master down into his own bar for a few drinks and slipped him a "ten spot" for good measure. It was much to the Dutchman's surprise that he was able to get Brooking through the customs when they reached England. (Information from conversation with Mr. Brooking.)

to continue the voyage to Hamburg or establishing a precedent, at variance with the historic Anglo-American practice of regarding food as conditional contraband, that might arise to plague them in a future war, delayed month after month in bringing the case to trial. Despite the absence of court briefs, the opposing positions of the British and American Governments in the case can be ascertained from diplomatic communications and memoranda of the *Wilhelmina's* counsel. Starting from apparent agreement on Article 33 of the Declaration of London that foodstuffs are not liable to capture unless destined "for the use of the armed forces or of a government department of the enemy State," the chief issue between the two governments was the effect of the German Federal Council's decree of January 25, 1915. There were also several subsidiary questions raised.

The position of the British Government, set forth in its notes to the United States of February 19 and March 13, 1915, may be summarized as follows:³⁷

1. The decree of the German Federal Council of January 25 placed all grain and flour in the Empire at the disposal of the government. In particular, Article 45 declared that all grain and flour imported into Germany after January 31 must be delivered only to certain organizations under direct government control or to municipal authorities. The subsequent repeal of this provision of Article 45 on February 6 (not known to the British Government until some two weeks later) was effected for the obvious purpose of defeating prize court proceedings against the *Wilhelmina*.³⁸

2. Hamburg is a fortified place, at least in the German definition of what constitutes a fortified place along the English coast. The German Government in public announcements and also by naval bombardment have

³⁷ Great Britain put forward in her note of Feb. 10, 1915, in reply to the American protest of Dec. 28, 1914, against the seizure of American cargoes bound for neutral European ports, an argument which, either by design or oversight, she failed to use in her communications of Feb. 19 and March 13 regarding the *Wilhelmina* case, which involved the direct trade in conditional contraband with Germany. The contention was that "the distinction between the civil population and the armed forces" in Germany had disappeared, since so large a proportion of the people were taking part, directly or indirectly, in the war. Accordingly, the British held, the distinction between foodstuffs destined for the civil population and those for the enemy government or its military and naval forces had broken down. As Professor Philip C. Jessup points out in his work on *Neutrality, Its History, Economics and Law* (Vol. IV, p. 60), this is the same argument used by the British Government in 1793 in its controversy with the United States. It is impossible to say how effective the American Government considered the contention that the "totalitarian" war waged by Germany justified the abolition of the category of conditional contraband. Nor do we know the relative persuasiveness of the other British arguments. In a note of April 4, 1915, Ambassador von Bernstorff, after stating that the United States Government had not succeeded in securing the release of the *Wilhelmina's* cargo, rather undiplomatically concluded: "The Imperial Embassy must therefore assume that the United States Government acquiesces in the violations of international law by Great Britain." *Foreign Relations, 1915, Supp.*, p. 157. The Ambassador was rather bluntly informed by the Secretary of State that the American Government "has at no time and in no manner yielded any one of its rights as a neutral to any one of the present belligerents." *Ibid.*, p. 160.

³⁸ The British Secretary of State for Foreign Affairs to the American Ambassador, Feb. 19, 1915. *Ibid.*, p. 335.

treated open cities along the English coast as fortified places; they have also seized neutral vessels with cargoes of conditional contraband bound for these undefended cities.

The German Government cannot have it both ways. If they consider themselves justified in destroying by bombardment the lives and property of peaceful civil inhabitants of English open towns and watering places, and in seizing and sinking ships and cargoes of conditional contraband on the way thither, on the ground that they were consigned to a fortified place or base, *a fortiori* His Majesty's Government must be at liberty to treat Hamburg, which is in part protected by the fortifications at the mouth of the Elbe, as a fortified town, and a base of operations and supply for the purposes of Article 34 of the Declaration of London.³⁹

3. England is justified in declaring foodstuffs absolute contraband and cutting off the food supply of both military and civil populations of the Central Powers as retaliation against Germany's ruthless treatment of civilians in the occupied areas of Belgium and France, her slaughter by naval and air bombardment of women and children in undefended English cities, and especially the inhumanity of her unrestricted submarine warfare against merchant shipping.⁴⁰

4. The policy of shortening a war by starving the enemy country into submission has the sanction of the highest German authorities. Prince Bismarck, in answering in 1885 an application from the Kiel Chamber of Commerce for a statement of the position of the German Government in regard to the prohibition by France of the rice trade to Chinese ports during the Sino-French war said: "The measure in question has for its object the shortening of the war by increasing the difficulties of the enemy, and is a justifiable step in war if impartially enforced against all neutral ships."⁴¹ Count Caprivi, in a discussion in the German Reichstag, March 4, 1892, on the international protection of private property at sea, made the following statement:

A country may be dependent for her food or for her raw produce upon her trade. In fact, it may be absolutely necessary to destroy the enemy's trade. . . . The private introduction of provisions into Paris was prohibited during the siege, and in the same way a nation would be justified in preventing the import of food and raw produce.⁴²

The American position,⁴³ as developed in the brief prepared by Mr. Lindheim and ex-Senator Towne of the *Wilhelmina's* counsel, consisted of two main points:⁴⁴

³⁹ The British Secretary of State for Foreign Affairs to the American Ambassador, Feb. 19, 1915. *Foreign Relations*, 1915, Supp., p. 336.

⁴⁰ *Ibid.*

⁴¹ The British Secretary of State for Foreign Affairs to the American Ambassador, March 13, 1915. *Ibid.*, p. 142.

⁴² *Ibid.*

⁴³ Ray Stannard Baker in his biography of Woodrow Wilson points out that as early as Sept. 28, 1914, Ambassador Page had yielded the right for which the United States was contending in the *Wilhelmina* case. Grey reports Page as saying that the United States had "no desire to press the case of people who traded deliberately and directly with Germany." Ray Stannard Baker, *Woodrow Wilson: Life and Letters*, Vol. 5 (Garden City, 1935), p. 209. See also *Foreign Relations*, 1914, Supp., p. 237.

⁴⁴ The implication that the position taken by the *Wilhelmina's* counsel was the State

1. The historic Anglo-American practice is to treat food destined for civilian populations as not subject to capture. The rule was stated by Secretary of State Hay on June 10, 1904: "Provisions which, though of ordinarily innocent are capable of warlike use, are not subject to capture and confiscation unless shown by evidence to be actually destined for the military or naval forces of belligerents."⁴⁵

In the Boer War Lord Salisbury announced that the British Government took the position that: "Foodstuffs, with a hostile destination, can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used, it must be shown that this was in fact their destination at the time of the seizure."⁴⁶

2. The regulations of the German Federal Council have no effect on the *Wilhelmina* shipment, for the following reasons: First, the regulations providing for government control and distribution of the grain supply specifically exempt from their purview foodstuffs imported after January 31, 1915. Second, that provision of Article 45 which specified that imported grain and flour must be sold to the municipalities, the war grain company limited or the central purchasing company has been rescinded.⁴⁷ Third, the German Government has notified the State Department of its willingness to permit the distribution of American foodstuffs in Germany by a special American organization under the supervision of American consular representatives.⁴⁸

V. SUGGESTED COMPROMISE

The dilatory tactics of the British prevented the rendering of a legal decision on the question of supplying the noncombatants of Germany with foodstuffs. Meanwhile, as the critical day of February 18 approached, when German war zone operations, that threatened to involve difficulties with the United States and other neutrals, would begin, the Imperial Government gave indications of willingness to strike a compromise. On February 12 Ambassador Gerard cabled that he was convinced that "German proclamation will be withdrawn if England will adopt Declaration of London or allow food to enter for German civil population." And Gerard hints that

Department's position is, I think, a valid one. Mr. Brooking, in a letter from London (Apr. 1, 1915) to the W. L. Green Commission Company, said that "The State Department is doing all possible to help us except making absolute demands." In the State Department the case was in the special care of the Solicitor, Cone Johnson, well known for his staunch advocacy of American rights against British pretensions.

⁴⁵ Brief prepared by Mr. Lindheim and ex-Senator Towne, *Wilhelmina Correspondence*. Although the *Wilhelmina* brief uses this reference to Secretary Hay's circular letter of June 10, 1904, as a quotation, it is really only a rough summary of the second paragraph of that letter. See *Foreign Relations*, 1904, p. 3.

⁴⁶ *Wilhelmina Correspondence: Wilhelmina Brief*. Also quoted in *Foreign Relations*, 1914, Supp., p. 374.

⁴⁷ Notice of the repeal appeared in the *New York Times*, Feb. 7, 1915, 1:2. The war grain company and the central purchasing company were private purchasing and distributing syndicates. The municipalities were local administrative bodies, elected by the inhabitants of the communes, and entirely distinct from the central government and the military and naval authorities. Legal Brief, *Wilhelmina Correspondence*. See also *Foreign Relations*, 1915, Supp., p. 106.

⁴⁸ *Ibid.*, p. 323.

the Secretary of State could further such a compromise "by suggesting that Congress will put embargo on export of arms unless England consents."⁴⁹

On February 20 Mr. Bryan stepped forward in the rôle of "honest broker," suggesting a compromise which he hoped would bring the British and German methods of naval warfare back within the old confines of international law: Neither side was to sow floating mines, display neutral flags on its merchantmen as *ruse de guerre*, nor use submarines against merchant shipping, except under rules of cruiser warfare; England was to permit the importation of food into Germany when consigned to American agencies for distribution to the civil population.⁵⁰

This suggestion failed when confronted by the unwillingness of both the British and German Admiralty staffs to give up the most promising weapon in their naval armory.⁵¹

Events transpiring in London made clear the reasons for Britain's reluctance to accept the American compromise suggestions. On February 15, 1915, Mr. Winston Churchill announced to the cheering House of Commons that the Allied Governments had decided to apply for the first time "the full force of naval pressure to the enemy."⁵² The manner in which this full force was to be applied was explained by Prime Minister Asquith in a statement of policy published on March 2, 1915:

The British and French Governments will, therefore, hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin. It is not intended to confiscate such vessels or cargoes, unless they would otherwise be liable to condemnation.⁵³

This decision was embodied in the British Order in Council of March 11, 1915. Since the Order in Council prevented all commodities, both contraband and non-contraband, from entering Germany, the importance of the *Wilhelmina* as a test case disappeared. The State Department's problem henceforth was to accept or reject the Order in Council; the battlefield of controversy had shifted from contraband to blockade. Accordingly, the British suggested a settlement⁵⁴ by having the question of damages assessed by a single referee jointly nominated by the British and American Governments. Lord Mersey heard the evidence and finally awarded the *St. Louis*

⁴⁹ Ambassador Gerard to the Secretary of State, Feb. 12, 1915. *Foreign Relations*, 1915, Supp., p. 102. Later, the German Government, under pressure from the military and naval heads, raised the "ante" to food plus key raw materials. See *ibid.*, p. 110. The State Department rejected Gerard's suggestion of a threatened embargo on arms. *Ibid.*, p. 129.

⁵⁰ The Secretary of State to Ambassador Page, Feb. 20, 1915. *Ibid.*, p. 119.

⁵¹ Ambassador Gerard to the Secretary of State, March 4, 1915. *Foreign Relations*, 1915, Supp., p. 132.

⁵² Parliamentary Debates, Commons, 1915, Vol. LXIX, p. 938.

⁵³ *Ibid.*, Vol. LXX, pp. 599-600.

⁵⁴ Ambassador Page to the Secretary of State, Apr. 8, 1915. *Foreign Relations*, 1915, Supp., p. 363.

firm its claim of Hamburg prices plus various items of damage. The British Government settled the particular case generously, but denied the principle for which the United States had contended.⁵⁵

VI. THE WILHELMINA INCIDENT AS "PROPAGANDA OF THE DEED"

The relation of the *Wilhelmina* case to the German propaganda in the United States remains to be pointed out. Count von Bernstorff, mentioning the case as one of the incidents erected by the German propaganda into an "Issue" arising from the illegal British trade restrictions, states that Herr Albert assumed the whole risk of the undertaking from behind the scenes and reaped the profit.⁵⁶ Mr. George Sylvester Viereck, prominent in German promotional activities in the United States during the war, tells a somewhat different story, explaining that Dr. Albert⁵⁷ induced the St. Louis firm to dispatch the *Wilhelmina* and safeguarded the shippers against loss by a secret agreement.⁵⁸

A more detailed statement of the facts is available from an examination of the correspondence of the W. L. Green Commission Company and their New York counsel, Hays, Kaufmann and Lindheim. A rich German-American, Mr. Simon,⁵⁹ made a loan of \$250,000 to the St. Louis firm with which to charter the *Wilhelmina*, purchase the foodstuffs cargo, pay insurance premiums and other expenses.⁶⁰ The W. L. Green Commission Company carried with two German insurance firms, the Mannheim Insurance Company and the Nord Deutsche Insurance Company, both marine and war-risk insurance. The war-risk policy had an extraordinary coverage, protecting the St. Louis shippers against loss in case their cargo was destroyed

⁵⁵ St. Louis Globe-Democrat, July 14, 1916, 11:7. Lord Mersey on July 13, 1916, awarded the W. L. Green Commission Company approximately \$390,000. The award was on the basis of the value of the cargo at Hamburg prices plus certain damage items due to the detention of the ship by the British, such as legal fees, loss of freight on return trip from Hamburg, etc.

⁵⁶ Count Johann von Bernstorff, *My Three Years in America* (New York, 1920), pp. 91-92.

⁵⁷ Dr. Heinrich Friedrich Albert. Officially, purchasing agent in the United States for the German Food Administration, Dr. Albert behind the scenes had charge of all German financial and economic activities in America. See George Sylvester Viereck, *Spreading Germs of Hate* (London, 1931), p. 50.

⁵⁸ Viereck, *op. cit.*, pp. 92-93.

⁵⁹ Probably the John Simon whom The New York Times reporter found in charge of the office of the Southern Products Trading Co. at 60 Beaver St. The New York Times, Jan. 23, 1915, 2:2.

⁶⁰ Mr. Marshall Hall to Mr. W. T. Brooking, Jan. 20, 1915; also, Mr. Norvin R. Lindheim to Mr. Marshall Hall, Feb. 25, 1915. *Wilhelmina* Correspondence. In 1920 Kaufmann and Lindheim were charged with having made a false statement regarding the ownership of the "Evening Mail" during the war. At the trial German activities of various sorts were brought to light, and it was established that the \$250,000 which John Simon had loaned to the W. L. Green Commission Company had been advanced to him by the German Government, or at least he had been guaranteed against loss in connection with the loan. Letter from A. G. Hays to author, Oct. 18, 1939.

by mines, captured by the Germans or *by the British*.⁶¹ The W. L. Green Commission Company therefore ran little risk of loss. They stood to make an attractive profit ⁶² if the cargo got to Hamburg; and since they would be in a position of pioneers in the trade, they probably could count on getting a large share of any future exporting of food to Germany.

From the German standpoint the shipment on the *Wilhelmina* offered two attractive possibilities. Either the cargo would get to Hamburg and the German civilian population be relieved from the tightening pressure of the British war of attrition or the cargo would be detained and put into prize court. If the shipment got through safely and the trade in foodstuffs from neutrals to Germany were reestablished, the prospect of Germany's winning the war would become infinitely brighter. If the cargo were held up and condemned, then the Teutonic propaganda could utilize the incident as an "Issue" to arouse the powerful farming interest of the Midwest to the iniquity of the British "blockade."⁶³

Why was the W. L. Green Commission Company of St. Louis selected to make the test case? The reasons are fairly obvious. The company was located in Missouri, the heart of the agricultural Midwest. The St. Louis firm was one of the largest exporters of grain in the United States, and before the war had carried on an extensive grain business with Germany. In 1914 its President, Mr. Marshall Hall, had been president of the influential Merchants Exchange of St. Louis.⁶⁴ Finally, Missouri was the home of a group of statesmen,⁶⁵ powerful in the reigning Democratic Administration, who could be expected to lend the St. Louis company the weight of their backing.

The *Wilhelmina* failed to re-open the trade in foodstuffs with Germany. Further, as grist for the German propaganda mills the incident was practically worthless. The price of wheat maintained itself around \$1.50 during the period January–February, 1915, when the *Wilhelmina* issue was in the headlines.⁶⁶ It was hard to get the midwestern farmers excited over the closing of the German foodstuffs market, when the British and French were

⁶¹ Conversation of the author with Mr. W. T. Brooking. Mr. Brooking stated that it was his opinion that Dr. Albert had guaranteed the insurance companies against loss.

⁶² Mr. Brooking denied that Dr. Albert had reaped the profits on the *Wilhelmina* shipment, as Count von Bernstorff implies in his account of the incident. If von Bernstorff is correct, what inducement was there for the W. L. Green Commission Company to undertake a shipment which conceivably could cause them serious loss of business among French and English sympathizers in the United States?

⁶³ The choice of ex-Senator Towne of Minnesota, a friend of Secretary Bryan, and well acquainted in the Senate, as Washington counsel in the case, shows evidence of a design to appeal to the midwestern community.

⁶⁴ Annual Statement of the Trade and Commerce of St. Louis for the Year 1915, Reported to the Merchants Exchange of St. Louis, p. 2.

⁶⁵ W. J. Stone, Chairman of the Senate Foreign Relations Committee; Champ Clark, Speaker of the House of Representatives; Joshua W. Alexander, Chairman of the House Committee on Commerce and Fisheries.

⁶⁶ May wheat at Chicago touched \$1.65½ on Feb. 3, 1915.

taking our surplus grain at unexampled prices. Besides, the American press and public, with the exception perhaps of those persons who knew the rules governing contraband and who had followed the diplomatic exchanges closely, had serious doubts about our right to send food to Germany, after the promulgation on January 25 of the German Federal Council regulations for the conservation of the food supply.⁶⁷ The German propagandists tried to draw a parallel between the killing of American civilians on the *Lusitania* by the submarine, and the starvation of German noncombatants by the British blockade. Though ethically the cases might be similar, there was the important difference that American women and children perished on the *Lusitania*, while the British measures affected only Germans. Besides, the Imperial Government discouraged its propaganda agents in America from proclaiming to the world that Germany was being starved through the British blockade. Such an admission, the government well knew, would bring not a relaxation but only a tightening of the sea pressure.

⁶⁷ The reaction of Mr. Marshall Hall himself to the German decree was perhaps typical of American opinion. In a letter of Feb. 1, 1915, to Mr. Norvin R. Lindheim, he states: "Without pretending to know anything about how this matter stands on a legal basis and speaking as a business man, and judging from the comments made by other disinterested people whose judgment I respect highly, the situation seems to me to have been entirely changed by the German Federal Council order taking over all private German stocks of foodstuffs. . . . I . . . do not think the public opinion will at all concede under present conditions that it would be a probable thing that such shipment would be kept out of the hands of a Government which had assumed absolute unconditional charge of all foodstuffs in the Empire." Mr. Hall to Mr. Lindheim, Feb. 1, 1915. *Wilhelmina Correspondence*.

The subsequent German explanation that the decree did not apply to imported foodstuffs, and that the provision of Art. 45 restricting the sale of imported foodstuffs had been repealed, failed to erase from the public mind in the United States the first impression, gained from English sources, that the German Government had made all foodstuffs in the Empire available for its armed forces.

EDITORIAL COMMENT

THE LAW OF NEUTRALITY AND THE POLICY OF KEEPING OUT OF WAR

There is always a danger of confusing law and policy. Often earnest and sincere advocates of a policy, in itself worthy, are able to bring it about that their policy is adopted as national law. National law may and sometimes does, as in the case of the Act of Congress of June 8, 1794, following the proclamation by President Washington of April 22, 1792, appeal to the mentality of mankind and then become generally approved. This proclamation of Washington and the Act of 1794 led Canning to refer to it as "a guide in a system of neutrality." The British Foreign Enlistment Act of 1819 was a tribute by a great maritime Power to the merit of the legislation embodying this American "system of neutrality." The fundamental concept of neutrality clearly implies that the neutral be "of neither party," eliminating policy in real neutrality legislation.

On the other hand, legislation having as its object to keep a state out of war must tend to be opportunist and to vary with the fortunes of war or with the effectiveness of the threats and the propaganda put forth by the respective belligerents.

The right of any state to change its laws from time to time is, of course, admitted, but such a change of domestic law does not imply any change in international law. The change in domestic law may or may not relate to matters within the field of international law, and the international responsibility of the state legislating may be involved only when domestic law conflicts with international law. The domestic law of a neutral state might, for instance, prohibit the sailing of its vessels to a named area outside the limits of a blockade proclaimed by a belligerent. This law would be, however, an expression of domestic policy only and would have no effect upon the limits of a blockade established by a belligerent in accordance with international law.

GEORGE GRAFTON WILSON

THE CITY OF FLINT

On or about October 9, 1939, the American steamship *City of Flint* was captured by a German cruiser at an estimated distance of some 1,250 miles from New York, with a mixed cargo destined for British ports. The vessel was taken into the harbor of Tromsø, Norway, on October 21, with a German crew and flying the German flag.¹ After there remaining for a few hours to

¹ Concerning the stay of the vessel at Tromsø, see statement by the Norwegian Government, Nov. 5, 1939, as set forth in Associated Press despatch of that date, published in New York Times, Nov. 6, 1939.

In the course of a statement broadcast by Captain Joseph A. Gainard, as printed in New York Times, Nov. 7, 1939, it was said: "When it was evident that we could take aboard

take water, the ship was ordered by the Norwegian Government to depart and did so. The vessel was taken into the harbor of Murmansk, Union of Soviet Socialist Republics, on October 23.

On October 25 the American Chargé at Berlin reported that the Foreign Office had said at a press conference that the *City of Flint* had been captured by a German vessel and contraband found on board, the captured ship being destined for England; and that it had been added that the ship was unseaworthy in that it did not have navigation charts adequate for bringing the ship into a German port. When the vessel entered the harbor of Murmansk, according to an announcement said to have been presumably from the Soviet Government through the Tass news agency, the naval forces at the port of Murmansk temporarily held the vessel and interned the German prize crew. On October 25 the American Chargé at Berlin reported that the German Foreign Office said, in reference to the seizure of the *City of Flint*, that "the German authorities were communicating with the Soviet authorities in the matter." On the same day the Tass agency reported that the German crew had been released from internment by the maritime authorities at Murmansk in view of the fact, as had been established, that the vessel had been brought into port for repairs of machinery, and also that the vessel was meanwhile remaining in Murmansk for verification of exact composition of its cargo. On October 26 the American Chargé at Berlin, referring to a memorandum received that day from the Foreign Office, reported that it stated that a prize crew placed on board the *City of Flint* had brought the vessel to the harbor of Murmansk because of "sea damage."² For some reason then unexplained the German crew was interned at Murmansk in spite of the fact that, according to the German authorities, they were without charts and had put into Murmansk because they could not proceed to a German port without charts. Later, the members of the crew were released, seemingly under a plea that their entry into Murmansk was required for necessary repairs to defective machinery.³

thirty-eight male passengers, the crew of a British ship were placed on board. A total of three officers and eighteen Germans were placed on board as a prize crew. They brought with them sixty hand grenades, twenty revolvers, twenty bayonets, twelve dynamite bombs and one machine gun. They used none of these, however, during the whole voyage, but eventually delivered them to the Norwegian authorities.

"The lieutenant in charge of the prize crew addressed our crew in good English as follows: 'I must tell you we proceed as a prize to Germany, where the Prize Court decides what becomes of your cargo. You are, as usual, to obey your own captain and his officers.'"

² It was added that an official of the German Foreign Office, when transmitting the memorandum, stated to the Chargé that the Foreign Office had no details as to the damage which necessitated taking the ship to Murmansk, but that he had maintained, in response to an inquiry, that the term "damage" would cover the case of a ship lacking charts with which to navigate the waters through which it had to proceed.

³ The statement of facts in the text reproduces a statement released by the Department of State Oct. 28, 1939, published in Dept. of State Bulletin of that date, p. 431.

On October 28 the Russian authorities ordered the *City of Flint* to leave the port of Murmansk in the control of the German prize crew; and the vessel thereupon departed from Russian territorial waters.⁴ The ship thereupon proceeded around the North Cape under German control and continued southward in Norwegian territorial waters where it was accompanied by a Norwegian naval ship. When outside of Sogn (a fiord north of Bergen), the German prize commander, reporting a sick man aboard, requested permission to stop at Haugesund in order to obtain desired medical treatment for that individual. A doctor sent aboard from the Norwegian naval ship, after examining the sick man, reported him to be suffering from an insignificant wound in the leg, a fact which caused the Norwegian authorities to inform the commander of the *City of Flint* that it could not be permitted to anchor at Haugesund. Nevertheless, the ship did there

⁴ Mr. Steinhardt, the American Ambassador at Moscow, reported under date of Oct. 27, a statement by Assistant Commissar of Foreign Affairs Potemkin in the following words: "The *City of Flint* had come into the port of Murmansk in charge of a German prize crew without any previous knowledge on the part of the Soviet Government and through no act on its part. The reason ascribed by the prize crew for the entry was damaged machinery making the ship unseaworthy. When the Soviet authorities at Murmansk judged that the vessel was again fit to put to sea, and being desirous of preserving its neutrality, the Soviet Government had ordered the vessel to leave the port of Murmansk immediately under the same conditions as those of her entry, namely, with both the German and American crews on board and her cargo intact. He added that the order would be enforced immediately and that the Soviet Government felt that its decision was not only in accordance with the well-recognized principles of international law and consonant with the obligations of a neutral but it was also the correct position to take as between the conflicting claims of the United States and Germany to possession of the vessel and her cargo and that by this he meant 'to send her out in the same status as she had entered one of the ports.'

"He said that his government did not consider that it had the right to turn the vessel and her cargo over to the American crew unless the German prize crew refused to take her out, as in the opinion of his government to do so would be an unneutral act. In reply to a question he stated that the decision of the Soviet Government to permit the German prize crew to take the vessel to sea was final.

"I then asked him who had verified the alleged damage to the machinery, to which he replied that he had no information on this subject, but assumed this had been done by the authorities at Murmansk.

"I again inquired concerning the welfare of the American crew and he said that it was his understanding that they had been on board the ship all of the time and were well.

"I then referred to my difficulties in making contact with the captain or members of the crew, reciting my repeated attempts to get into communication with them by telegram and telephone, as well as my inability to obtain a plane today. He disclaimed any responsibility for these difficulties, passing over the subject lightly by pointing out that the crew being on board the ship in the roadstead, in conjunction with the average delays in long distance telephone communication had probably brought about this 'unfortunate result.'

"I am again endeavoring to complete a telephone connection with the captain of the *City of Flint* at midnight." (Dept. of State Bulletin, Oct. 28, 1939, p. 430.) In the same report the Ambassador stated that he had vigorously reiterated his indignation at the lack of coöperation by the Soviet Government in withholding information from him while issuing communiqués with respect to the *City of Flint* through the medium of the Tass agency.

anchor on November 3, in consequence of orders said to have come from the German Government. (In accordance with what were conceived to be the requirements of the Hague Convention of 1907 Concerning the Rights and Duties of Neutral States in Naval War, the ship was removed from the control of the German prize crew, which was temporarily interned, and the vessel surrendered to its own American crew.⁵ The ship proceeded to Bergen on November 4.)

(The law of nations does not at the present time permit the captor of a neutral prize to take the vessel into the port of another neutral state and there sequester it pending the decision of a prize court.⁶) On the other hand, as has been recently observed, (if the neutral permits sequestration, it is undoubtedly giving assistance to a belligerent and enabling it to use neutral territory as a base for one form of belligerent activity.)⁷ This fact suffices in itself to cause one greatly to doubt whether maritime states generally acknowledged in 1907, when the Hague Conference assembled, that a neutral state possessed the right to permit sequestration, and to demand convincing evidence in support of any assertion that it did. There is, however, a paucity of such evidence. No instance has been seen where a local statute or regulation assertive of the rights of a neutral with respect to prizes, and enacted during the century immediately prior to the consummation of the Hague Convention, made specific provision for sequestration.⁸ It is reasonable to conclude that when the United States declined to adhere to Article XXIII of the Hague Convention, which permitted as between the contracting parties the sequestration of prizes under conditions that were specified, and by such means sought to protect itself against any relaxation of the normal requirements in relation to prizes, it was endeavoring to safeguard itself against the operation of a fresh privilege yielded by treaty to a

⁵ See statement by Norwegian Government of Nov. 5, 1939, contained in Associated Press despatch of that date, as printed in New York Times of Nov. 6, 1939.

On Nov. 3, 1939, it was announced that the American Chargé in Berlin had reported the receipt of information from the German Foreign Office that appropriate German naval authorities had been requested to comply with the desire of the United States that all precautions be taken to avoid exposing the members of the American crew of the *City of Flint* to unnecessary danger. (Dept. of State Bulletin, Nov. 4, 1939, p. 458.)

On Nov. 27, 1939, the *City of Flint* left Bergen for Haugesund. See New York Times, Nov. 28, 1939, p. 3.

⁶ Declared the Department of State on Oct. 28, 1939: "A prize crew may take a captured ship into a neutral port without internment only in case of stress of weather, want of fuel and provisions, or necessity of repairs. In all other cases, the neutral is obligated to intern the prize crew and restore the vessel to her former crew." (Dept. of State Bulletin, Oct. 28, 1939, p. 432.)

⁷ Comment by the Reporter on Art. 29 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aërial War, this JOURNAL, Supp., Vol. 33 (1939), p. 458.

⁸ The statutory regulations enacted since that event and prior to the European war initiated in 1939, as revealed in the texts published in Deak and Jessup, *Neutrality Laws*, have been obviously designed to make appropriate provision to harmonize with the Hague Convention, a fact which in some instances has been acknowledged in terms.

neutral state.⁹ That endeavor was successful. Thereafter, if either Germany or Russia felt that, as in the war initiated in 1939, the Hague Convention was applicable to American ships, they were obliged either to accept the terms on which the United States adhered thereto by acknowledging that the provisions of Article XXIII were not to be utilized against such vessels, or to forego the right to invoke any portions of the treaty as against the United States. They could not cause the United States to burden itself with the convention on terms other than those set forth in its adherence.¹⁰

It may be observed that Great Britain did not accept (and is not understood as yet to have accepted) the convention. Inasmuch as Article XXVIII thereof declared that "the provisions of the present convention do not apply except as to the contracting parties, and then only if all the belligerents are parties to the convention,"¹¹ it may fairly be contended that the agreement was not applicable in the instant case. Whether or not, therefore, it was to be regarded as applicable, it is not apparent how either Russia or Germany could properly invoke the privilege of sequestration against the United States. Without the benefit of the treaty they were impotent to do so; by means of the treaty minus Article XXIII they were no better off.

It may be noted that in reported discussions concerning the *City of Flint* there appears to have been no reference to the matter of sequestration of the vessel. It was rather suggested that the ship proceeded to the distant port of Murmansk for other reasons, such as on account of defective machinery

⁹ It may be noted that the United States did not sign the convention, but deposited its adherence subsequently, with the reservation and exclusion of Art. XXIII.

¹⁰ It is perhaps, therefore, unnecessary to seek to appraise the significance of acts on the part of Germany or Russia in connection with the negotiation of the convention or thereafter, which may point to acceptance of the terms of the adherence by the United States. Nevertheless, certain statements that have been made in relation to the matter are of interest: "With reference to the action taken by the Government of the United States, in its declaration of adherence to the Convention, in reserving and excluding Article XXIII, I have to inform you that it does not appear from the official records of this Government that any formal acknowledgment or acceptance of this reservation was made on the part of any of the contracting parties." (Mr. Charles M. Barnes, Chief, Treaty Division, Dept. of State, to the writer, Dec. 18, 1939.)

Declares Mr. Hunter Miller: "It thus appears to have been within the contemplation of the Powers, particularly in view of the very numerous reservations made at signature to the different conventions of 1907, that a non-signatory Power might make its reservations upon adhesion, at least in the case when such Power has made what may be called a general reservation, such as was made by China, and, as to Convention XIII, by the United States." (David Hunter Miller, *Reservations to Treaties*, Washington, 1919, pp. 152 and 154.) Mr. Miller also adverts to the fact that the delegation of the United States made an express general reservation in regard to the convention itself at the eighth plenary session of the Conference on October 9, 1907, *id.*, 153.

It may be noted that in the *Reichs-Gesetzblatt*, 1910 (No. 3715), p. 382, is printed the text of the reservation by the United States, from which may be fairly drawn the conclusion that Germany formally accepted the terms of the American adherence.

¹¹ Malloy's *Treaties*, II, 2362.

or unseaworthiness. In view, however, of the position of the vessel when captured and when it later approached the coast of Europe, where Scandinavian ports were nearer at hand and better available to satisfy the legitimate needs of the ship and its occupants, it is not unreasonable to conclude that sequestration was the real end in view when Murmansk was sought and became the destination of the vessel.¹² Such a conclusion finds support, moreover, in data released by the Department of State, on October 28, 1939.¹³

It is not sought to be intimated that the *City of Flint* could not have been in need of such succor as Russia might lawfully have yielded when the vessel approached or entered the harbor at Murmansk. The Soviet authorities did not, however, offer to the United States evidence of such a state of facts, or proof that the relatively protracted sojourn of the ship in Russian waters was necessary.¹⁴ Thus, when the vessel was permitted to leave Murmansk

¹² It may have been realized at Berlin as well as Moscow that sequestration was a dangerous matter to inject into any diplomatic controversy concerning the treatment of the ship. It must have been perceived that the Government of the United States was shrewd enough and likely to be persistent enough to expose the weakness of an acknowledgment that sequestration had been sought by the captor or yielded however briefly by the neutral sovereign at Murmansk. In the circumstances of the case it was more convenient to allege the need of legitimate succor, even though the allegation lacked a solid foundation and was merely to be utilized as a face-saving device.

¹³ Declared the Department of State in its statement of Oct. 28, 1939: "The conclusion from the foregoing facts and circumstances indicates that when the *City of Flint* entered the harbor at Murmansk, any plea relating to the chart requirements if advanced must have been ignored since the German crew was interned. A second and entirely different reason for entering at Murmansk, namely, defective machinery which called for immediate repairs, was not advanced until later. A subsequent cable from the American Chargé d'Affaires at Berlin, also dated October 26, quoted a statement of the Foreign Office at its noon press conference to the effect that the fact that the Russians have freed the German crew indicates that the Soviet authorities have confirmed the view of the prize crew that the *City of Flint* was unseaworthy and it was therefore permissible to take the ship into a neutral harbor. . . . It seems manifest that even if it is assumed that the German crew was proceeding legally prior to the entry of the *City of Flint* into the harbor of Murmansk, the known facts and circumstances support the contention of the American Government that the German crew did not at the time of entry offer any reasonable or justifiable grounds such as are prescribed by international law for taking the vessel into this port, and that therefore it was the clear duty of the Soviet Government to turn the *City of Flint* over to the American crew. This has been the major contention of the American Government.

"In view of the foregoing facts and circumstances, each person can judge for himself the question as to how much light is shed on this entire transaction by the action of the Soviet Government in withholding adequate coöperation with the American Government with respect to assembling and disclosing to the American Embassy in Moscow the essential facts pertaining to the landing, the whereabouts, and welfare of the American crew; by the fact that it was first alleged by the German authorities that the need for charts was the ground for bringing the vessel into port; and by the fact that later this ground seems to have been abandoned and a new ground or theory relating to defective machinery was set up." (Dept. of State Bulletin, Oct. 28, 1939, p. 432.)

¹⁴ On Oct. 30, 1939, the Department of State announced a Tass agency report, communicated by the American Ambassador at Moscow, stating that "on October 28 in the evening

States.⁸ The action in regard to submarines is in accord with the resolution adopted by the Inter-American Conference at Panama on October 3, 1939.⁹ The Panama resolution in regard to armed merchantmen accepts the position taken by the United States in its reservation to Article 12 of the Havana Convention of 1928, rather than the text of that article which more closely reflected the sound position under international law.¹⁰)

Although it is impossible to review here all aspects of the neutrality policy of the United States during the present wars and conflicts, one cannot mention the repeal of the arms embargo without also calling attention to the imposition of a "moral embargo" on shipment of aircraft to states charged with bombing of civilians. The Soviet Union and Japan are the anonymous and undeclared-belligerent objects of this "moral embargo."¹¹

PHILIP C. JESSUP

THE DUTY OF IMPARTIALITY ON THE PART OF A NEUTRAL

During the recent debate over revision of the neutrality legislation of the United States, the position was taken by certain distinguished international lawyers that it would constitute a violation of international law for the Congress of the United States to change its legislation, during time of war, by repealing the arms embargo for the purpose of helping the enemies of Germany.¹

[It has frequently been said by text-writers that impartiality is the essence of neutrality; and from this it might be deduced that, since many changes in domestic law made during wartime would work to the benefit of one or other of the belligerents, any such change would violate the duty of impartiality and is, therefore, prohibited. Practice, however, does not support such a statement of the rule,] which is believed to be better expressed in the draft convention prepared by the Harvard Research in International Law:

¹ Department of State Bulletin, Nov. 4, 1939, Vol. I, p. 456; Supplement to this JOURNAL, p. 56.

² *Ibid.*, Oct. 7, 1939, Vol. I, p. 328; Supplement to this JOURNAL, p. 9.

³ See the Draft Convention cited *supra*, note 3, Art. 28 and Comment, p. 435, at 446.

⁴ See Third Annual Report of the National Munitions Control Board, For the Year Ended November 30, 1938 (76th Cong., 1st Sess., H. Doc. No. 92), pp. 79-80, and New York Times, Dec. 3, 1939.

⁵ See the letter signed by Charles Cheney Hyde and Philip C. Jessup, in the New York Times of Sept. 21, 1939. Subsequent debate over this letter in the same journal is to be found in the issues of Sept. 25 (Eagleton); Oct. 1 (Breckinridge); Oct. 5 (Hyde and Jessup); Oct. 7 (Breckinridge); Oct. 14 (Laporte); Oct. 15 (Eagleton); and in the New York Herald-Tribune, Oct. 26 (Kuhn).

The New York Herald-Tribune asked of certain international lawyers who had been connected with the study made by the Research in International Law the following question: "Would a repeal of the arms embargo at the present time constitute, under existing international law, a violation of the neutral obligations of the United States?" In its issue of Oct. 25, it listed replies as follows: Borchard, Hyde and Jessup in the affirmative; Briggs, Burdick, Coudert, Dulles, Eagleton, Fenwick, Kuhn, Turlington, Woolsey, Q. Wright, in the negative.

A neutral State, for the purpose of better safeguarding its rights and interests as a neutral or of better fulfilling its duties as a neutral, may, during the course of a war, adopt new measures or alter the measures which it has previously adopted, provided, however, that the new measures adopted do not violate any provision of this convention.²

The revised Neutrality Act passed during the special session of Congress seems to conform to this statement of the rule. Since it restores our practice, to some extent, to accord with the normal and generally understood practice of nations, it enables the United States better to fulfil its duties as a neutral. If it is argued that it constitutes a relaxation of restrictions, it must be admitted that other provisions of the law increase restrictions; it would be difficult to show that the Act as a whole has relaxed or increased restrictions. Certainly, if the repeal of the arms embargo should be a change to the disadvantage of Germany, other provisions of the law would equally work to the disadvantage of the enemies of Germany, and would be equally illegal.

It is a slightly different argument that change in law made during time of war is illegal when made for the purpose of assisting one belligerent side. If, however, such a statement of the rule is correct, how could such a purpose be established? There is no evidence of an intent to aid England and Germany in the law itself, nor could it be established from the debates in Congress. The desire to return to normal practice, and to uphold international law in general and our neutral position in particular, affords ample justification for the change. What tribunal could pass upon the intent of Congress, and ascribe to it motives which are not found in the law itself? ³ As an answer to this question, it is suggested that the displeased belligerent, and it alone, would sit as the judge in this case, and would assess penalties; and this leads us into much broader inquiries into the meaning and operation of the law of neutrality.

Is it the legal duty of a neutral to be impartial? If a neutral state should change its law during war, for the deliberate and openly acknowledged purpose of aiding one or other of the belligerents, would it thereby fail in any duty imposed upon it by international law? Many writers could be cited in the affirmative answer to this question; yet there appear to be no cases upon the point. (Can any case be cited in which the tribunal was called upon to decide that a neutral had lost its status as a neutral, or that a neutral should pay damages, because it had failed in its duty to be impartial? Did a neutral ever plead before a tribunal that a belligerent should make reparation to it on the ground that the belligerent had denied to the neutral the status of neutrality which it claimed?)

There are, of course, various specific duties for the non-performance of which international law holds a neutral responsible. Thus, the failure of

² This JOURNAL, Supp., Vol. 33 (July, 1939), p. 316, Article 13.

³ See the argument upon this point of James W. Ryan, Congressional Record, Vol. 85, pp. 585-589, Oct. 11, 1939.

England to prevent the departure of the *Alabama* might have been regarded as showing favor to one side; but damages were awarded by the tribunal because of failure in a specific duty. From such cases the conclusion is not to be derived that any act which results in helping one side more than the other is to be regarded as illegal. (The very fact that specific rules are in some cases stated, and the additional fact that states are held judicially liable only for violation of such specific rules, indicate that failure in some vague general duty of impartiality is not a justifiable issue.)

What are, in practice, the results of a neutral's failure to be impartial? There is no evidence that it results in responsibility, adjudicated by a court and calling for pecuniary or other reparation—aside from failure with regard to specific duties expressed in the law of neutrality. (The failure to perform a specific duty (as in the *Alabama* case) would permit a legal claim and perhaps the collection of damages, but would not affect neutral status; the failure to be impartial, on the other hand, would not arouse or justify a legal claim for damages, but might modify or end neutral status. In the latter case, the decision would seem to lie entirely with the belligerent, which may seize upon some action of the neutral, denounce this action as a violation of the duty of impartiality, and reply to it by resorting to war against the neutral, thus ending its status as a neutral. This, certainly, would not be a legal decision.) Germany might thus assert, without reference to any tribunal, that Holland had failed in her duty of impartiality (it would not matter how), and thereupon invade Holland. Apparently, the belligerent may also reply to an alleged failure in impartiality on the part of a neutral by measures less than war, such as seizing vessels, which would have the effect, not of ending neutral status, but of denying a portion of that status, or denying certain rights of neutrality to this neutral. Again, this is not a matter which the belligerent refers to a court; it is a unilateral decision on the part of the belligerent against which the neutral has no judicial remedy. (Perhaps impartiality is to be regarded as an attribute or qualification of neutral status, rather than as a positive duty; lack of impartiality might, then, mean that the neutral is no longer to be regarded—by the belligerent—as a neutral.)

This situation appears to be political or military in character, rather than legal. It would not be beyond the capacity of the judges in an international tribunal to give a decision as to whether a neutral had been legally impartial or not, if this were required, but no cases are known of this type. There is no practical way in which the belligerent can be submitted to the jurisdiction of the court for this purpose, at the time when the neutral most needs protection. We encounter here another of the anomalies which must always be found in international law so long as war, the antithesis of law, is permitted to continue. (The so-called law of neutrality is for the most part a game to be played between the neutral and the belligerent, usually without an umpire, and with very few rules. The game depends largely upon how far the neutral may be "bluffed" by the belligerent.) The character of mod-

ern war and the pressure of modern interdependence reveal this situation. It is obvious today that, whatever action a neutral may take, even without reference to the war, will favor one belligerent more than the other; whereupon, the displeased belligerent may accuse the neutral of a failure in its duty of impartiality. The belligerent, however, will not take this claim into court and ask for reparation or a decree; instead, it will act as its own judge and impose its own penalties in the form of captured ships or other reprisals. Must the neutral, for fear of such a one-sided decision, or for fear of being drawn into war, refrain from taking the action contemplated? His decision on this question, if it is submitted, must be a political one; he could not find relief by bringing the belligerent before a court.

Taking the situation of the United States today, let us suppose that the repeal of the arms embargo was intended to build up our trade in arms and thereby our munitions factories, so that we would be better equipped to defend ourselves in the dangers which surround us. Assuming this to be the sole or chief reason for the change, must this nation refrain from strengthening itself in this fashion because the fortuitous result would be to aid England more than Germany? Self-preservation is sometimes listed as one of the fundamental rights of a sovereign state; is this vague neutral duty, interpreted only by the belligerent, to supersede this fundamental right?

Let us suppose, again, that a neutral state is permitting sale to belligerents, but that later, while war is in progress, it comes to fear the exhaustion of certain of its natural resources, such as oil or iron, and therefore, for purposes of national conservation, forbids further export of these materials. The result would undoubtedly be to hurt one belligerent more than the other; in this case, could the former complain that the neutral was violating its duty of impartiality and demand that it abandon its efforts at conservation? Or again, if the United States should discover vast new supplies of helium and therefore relax restrictions against its sale, during war, would this be an illegality? If, in pursuance of the requirements of our present tariff laws, we should change our rates and make them discriminatory against a state which had discriminated against us, would this be illegal when that state happens to be a belligerent? What law could be passed by a neutral during a war anywhere in the world? Even a change in postal regulations might not work out impartially as between belligerents. It would even be possible for a state at peace, fearful of a change in our laws, to declare war against Liberia or Yemen, without moving a man or a gun, and thus make it impossible for us to proceed with the proposed change of law.

This is a *reductio ad absurdum*, of course; but it none the less calls for reflection. Many strange things are being done nowadays. It is no answer to point out that the examples above are not neutrality laws; the arms embargo or its repeal was not a neutrality law, from the viewpoint of many of those who supported it; it was simply a measure to keep the United States out of war. If the duty of the neutral is to be impartial, there are few laws

which it could change during war; for, in this interdependent world, almost any change would have some effect upon other states. Indeed, if its duty is to be impartial, it must worry about the effect of some laws in effect before the war began. The arms embargo, passed before the present war was commenced, was disadvantageous to England and France; was not this as much a failure in impartiality as repeal of the arms embargo, which would be disadvantageous to Germany? One answer to this would be that the rule forbids changes only after war has begun; but surely this is nonsensical, for one is as much a failure in impartiality as the other. Another answer would be that the impartiality required is a technical one rather than a factual one: that the neutral state has no duty to equalize geographical factors, or inequalities in armaments or other materials. But if this is to be the guiding principle, surely it should apply to laws passed after war has begun as well as to laws already in effect before the war.

No self-respecting state can submit to a rule which would deny the use of its own legislative function, or prohibit it from taking discriminatory action in its own behalf, simply because a war is somewhere in existence.) It is bad enough to permit any one state to upset the order and happiness of the entire world simply through the magic of a unilateral declaration of war; but to permit such a declaration to overshadow and override actions of a neutral government having no relation to the war except that of accident, cannot be conceded. It cannot even be conceded that the power of discrimination is taken from it. The neutral has already been forced to submit to far too much interference. There are no judicial precedents to show that a neutral may not change its laws as it pleases, during war; the treaties and codes ask only that the laws of neutrality be impartially applied.⁴ And certainly the right of retaliation has never been taken from the neutral: if the belligerent violates the law to the injury of the neutral, the neutral may equally violate the law by way of reprisal. (It is not pleasant to think of replying to one illegality by another illegality; but how else, in the absence of international government, can a state defend itself against a law-breaker? *De*

Nor are there judicial precedents to show that a neutral owes a duty of impartiality between belligerents; this is a political matter, to be fought over by diplomats, or decided by the high command. A neutral will not ordinarily care to risk offending one belligerent by favoring another; but he may find it desirable to do so. He may find that a belligerent is stretching the law of neutrality to his injury; in such a case, he may properly wish to retaliate by discriminating in some fashion against that belligerent. Is he

⁴ Art. 9 of the Fifth Hague Convention of 1907: "Every measure of restriction or prohibition taken by a neutral power . . . must be impartially applied by it to both belligerents." Note also the Preamble and Art. 9 of the Thirteenth Hague Convention of 1907, which speak of the duty to apply impartially *these rules*—i.e., certain specific rules therein stated. To the same effect Art. 9 of the code of the International Law Association, 1928. These statements do not lay down a general rule of impartiality; they require impartiality in the application of certain designated and specific rules.

forbidden by international law to do so? Certainly not. He is not forbidden to go to war; why should he be forbidden to take measures less than war? In either case, he takes a risk; but it is not the risk of judicial condemnation; it is the risk of hostile action from the belligerent. This, to sum up, is all there is to the so-called rule of impartiality in the law of neutrality.

Such an inquiry as this reveals again the futility and sterility of neutrality. Except for a few specific rules which the court will apply, the neutral is free—and he must be free—so far as law goes, to make his own decisions. Judicial decisions in the field of the international law of neutrality have dealt for the most part with neutral individuals; they have set but few restrictions upon the freedom of action of a neutral government. Neutrals have been too submissive to war-makers; they are now learning that they must stand up against the war-maker, if they wish to have any freedom left. They should emphatically repudiate such a statement as this:

The neutral State which takes action under this article may be required to bear the burden of showing that the change in its rules was induced by its own neutral necessities and not by the desire to aid one or the other belligerent.*

No such burden rests upon the neutral. It is the belligerent which has precipitated the disorder; it is the neutral which wishes to pursue the ordinary activities of life. If justification must be found for limiting the right of the neutral to pursue his ordinary courses, that burden must rest upon the belligerent. (The mere fact of belligerency does not establish the belligerent upon Olympus, with power to command all other states. Even if the action taken by the neutral be for the definite purpose of aiding one of the belligerents, he has committed no illegality; he may have subjected himself to the risk of attack, but he has violated no law.) He has as much right to lesser actions to maintain his own interests as the belligerent has to resort to war. The belligerent has too long dominated the scene; neutral states should stand up against his pretensions. Their safest course is to combine in advance and forbid him to make war.))

CLYDE EAGLETON

AÉRIAL FLIGHTS ABOVE A THREE-MILE OR OTHER VERTICAL LIMIT BY
BELLIGERENTS OVER NEUTRAL TERRITORY

Following the vigorous protests by the Belgian and the Netherlands Governments to Germany, because of the various flights by military *aéroplanes* over the territory of these neutrals, a Havas dispatch reported on November 14, 1939, that the German Government was seeking to justify these flights by the fact that they were conducted at a height above neutral territory of more than three miles. Although no official pronouncement to this effect

* Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, this JOURNAL, Supp., Vol. 33 (July, 1939), p. 318.

has been made up to the time of this writing, it was reported from London in diplomatic circles, as late as November 23, 1939, that the Nazi leader was considering a plan to shorten the flying distance between German air bases and British seaports by acting upon the theory that just as jurisdiction over territorial waters is limited to three miles as a zone of easy defense, so jurisdiction over the air-space should be limited to the distance above the earth's surface at which anti-aircraft guns are effective.¹

Without taking a contention of this kind too seriously as one having any foundation in international law, it is well to realize at the outset the serious threat which the whole structure of neutral rights and duties in warfare would sustain if there were any vertical limits whatever to the control by neutrals of the air-space over their territory. It is plain that once a limit were set, the burden would be upon the neutral to prove that any aircraft shot down or compelled to alight was below such vertical limit. (All neutrals, especially the weaker ones within the line of combat, would find themselves powerless to protect either their neutrality or the safety of life and property within their domain.)

It is of interest to recall that when aërial navigation first began to be a practical means of transportation in peace and war, differences of opinion existed among jurists as to the legal nature of the aërial domain. Some writers contended for absolute freedom of the air, others for absolute territorial jurisdiction over it, and still others for sovereignty subject to a right of free passage whenever the interests of the subjacent state were not jeopardized. Even governmental authorities were not clear upon this question. Shortly after the beginning of the last war, the British Government apologized to the Swiss Government for the act of an aviator in flying over Swiss territory. It then took occasion to say that "such expressions of regret for non-observance of instructions are not to be interpreted as recognition by the British Government of the existence of a sovereignty of the air."²

These differences of legal opinion came to light at the discussion of aërial warfare during the Madrid meeting of the Institute of International Law in 1911. It was then felt that no artificial barriers should be placed in the way of the development of aërial flight. Yet it was precisely a British jurist, Professor T. E. Holland of Oxford, who opposed the idea of free passage: "We should begin with the principle of the sovereignty of States rather than the freedom of aërial navigation." Indeed, Holland deeply regretted that science had made aërial flight possible.³

Whatever may have been the scope of the undefined right of free passage, the multipartite Air Navigation Convention of October 13, 1919, left no

¹ New York Times, Nov. 24, 1939, pp. 1, 16.

² James W. Garner, *International Law and the World War* (1920), Vol. 1, p. 480, n., citing London Times, Dec. 8, 1914.

³ 24 *Annuaire de l'Institut* (1911), p. 137.

doubt (Art. 1) that every state has complete and exclusive sovereignty over the air-space above its territory and territorial waters; also (Art. 3) that

each contracting State has the right for military reasons or in the interest of public safety, to prohibit the aircraft of other contracting States, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other contracting States, from flying over certain areas of its territory.

The convention was designed to apply primarily in peace time, but it was further provided (Art. 38) that in case of war, the convention should not affect the freedom of action of the contracting states either as belligerents or as neutrals. A similar provision is to be found in the Havana Convention of 1928 on Commercial Aviation (Art. 29).

Even those writers who in the early days asserted the freedom of air navigation, fully recognized that the principle could not apply in time of war. The French jurist, Fauchille, represented an exception in that he favored the right of a belligerent aircraft to pass over neutral territory above a certain altitude provided it did not hover or engage in hostile operations. (In view of the latest developments of aerial warfare, it is obvious that such theoretical safeguards of neutral rights have now become quite illusory.) Fauchille was led to his theory of "innocent free passage" by the consideration that otherwise a belligerent could not reach his opponent where their frontiers were not contiguous. However, the same difficulty is presented in land warfare between non-adjacent belligerents and we have but another instance of the false conclusions resulting from careless analogies between the high seas and the air-space.

During the war of 1914-1918, adjacent neutrals, particularly The Netherlands and Switzerland, made vigorous protest to the belligerents of both sides where flights were attempted over their territory. Indeed, no instance is recorded in which a belligerent laid claim to pass over neutral territory as a matter of right. In most instances such violations were not at such height as to come within the possible application of the three-mile rule, and violations were promptly followed by apology and sometimes by the offer of a suitable indemnity. France offered such redress when a French aviator through error bombarded the Swiss town of Porrentruy (April 26, 1917), and Germany did likewise when bombs were dropped by German aviators at Chaux-de-Fonds (October 17, 1915).⁴

The real proof of the impossibility of allowing passage over neutral territory even at great height was demonstrated by the combat which took place on December 7, 1917, between German and Allied aviators over Swiss territory in the neighborhood of Basle. The Germans, being hard pressed by their opponents, flew over Switzerland in the hope of escaping. In the course of the battle, bombs were dropped upon Swiss territory. Both com-

⁴ Garner, *op. cit.*, pp. 472-473.

batants were fired upon by Swiss anti-aircraft guns, but they were at such an altitude as to be beyond the range of fire.⁵

The question whether neutrals have an active duty to prevent the passage of belligerent aircraft over their territory is becoming more or less academic. In the present struggle, the European neutrals are supplied with anti-aircraft guns having a much greater range than any known in the last great war. What is more significant is that neutrals now send up their own aircraft to actively contest the passage of belligerent planes. Thus, on November 20, 1939, a German military plane flying along the Roer River near Roermond in The Netherlands, was brought down by pursuit planes of The Netherlands, the pilot being killed in the crash.⁶ A similar encounter occurred on the previous day with two German planes, which then headed back toward Germany.⁷

The technical advances made in the art of flying and the increasingly deadly character of bombs and other weapons carried aboard aircraft in war, have made impossible the recognition of any vertical limit to the sovereignty of the subjacent state. This was fully recognized in 1923 by the Report of the Hague Commission of Jurists upon the Revision of the Rules of Warfare. Not only were belligerent military aircraft forbidden to enter the jurisdiction of a neutral state (Art. 40), but it was provided that "a neutral government must use the means at its disposal to prevent the entry within its jurisdiction of military aircraft and to compel them to alight if they have entered such jurisdiction." (Art. 42.) The latter provision was incorporated in substantially identical form in Article 95 of the Harvard Research Draft Convention on Rights and Duties of Neutral States in Naval and Aërial War.⁸

The force of gravity, omnipresent and relentless, makes any vertical limit to sovereignty over the air-space impossible in time of war. ✓

ARTHUR K. KUHN.

ARMED MERCHANTMEN

The public press informs us that belligerent merchant ships are entering American harbors armed fore and aft with four six-inch guns. So far as known, no American protest against this practice has been made, but on the contrary it has been said that if armed "for defense" they may be treated as innocent merchantmen both on the high seas and in neutral ports. Moreover, although the Havana Convention of 1928 on Maritime Neutrality had provided that armed belligerent merchantmen were to be treated in port and territorial waters on the same basis as warships,¹ the Panama Declaration of October 3, 1939,² provides that the American Republics —

⁵ Garner, *op. cit.*, p. 473.

⁶ New York Herald-Tribune, Nov. 21, 1939, p. 2.

⁷ *Ibid.*

⁸ See this JOURNAL, Supp., Vol. 33 (July, 1939), pp. 764-768.

¹ Art. 12, par. 3. The United States, for reasons not known, made a reservation to that paragraph.

² 1 Bulletin 328 (Oct. 7, 1939).

shall not assimilate to warships belligerent armed merchant vessels if they do not carry more than four six-inch guns mounted on the stern, and their lateral decks are not reinforced, and if, in the judgment of the local authorities, there do not exist other circumstances which reveal that the merchant vessels can be used for offensive purposes. They may require of the said vessels, in order to enter their ports, to deposit explosives and munitions in such places as the local authorities may determine.

Inasmuch as this question was dealt with by the United States and other neutrals during the last Great War, it seems strange that invalid distinctions between "offensive" and "defensive" armaments, which were then discredited, should now be revived.) Mr. Winston Churchill informs us that over 1,000 British merchantmen are already armed and that he expects to have 2,000 ready shortly. Some of them are apparently provided with naval gun crews. The question is likely to assume renewed importance, since some of these vessels are likely to be sunk by submarines or will enter neutral ports. Their legal status ought not, therefore, to be left in doubt.

This precise question confronted the United States in August, 1914, when Great Britain protested under the "Alabama" rules of Washington against German ships leaving American harbors with guns below deck to be mounted at sea and undertaking depredations on British commerce. On the other hand, Germany protested against the admission of armed British merchantmen. But on the British "fullest assurances that British merchant vessels will never be used for purposes of attack, that they are merely peaceful traders armed only for defense, that they will never fire unless first fired upon," Mr. Lansing framed a circular, September 19, 1914, endeavoring to define the criteria for distinguishing offensive from defensive armament or use.³ Mr. Lansing sought to make *motive* the test. The fact that armament necessarily invited attack was overlooked. In fairness to Mr. Lansing, it should be said that in 1914 he had in mind only German surface raiders as dangerous to British merchantmen.

The appearance of the submarine in 1915 as a serious menace to commerce caused confusion rather than a clarification of the law. Although British

³ For. Rel., 1914, Supp., 611-612. Lansing thought that if armed "for the sole purpose of defense," the ship did not acquire "the character of a ship of war," that while the presumption was that any armament was "for offensive purposes," the presumption could be overcome, and he then set out certain criteria of "defensive" armament, including the size of the guns, their limited number, "that no guns are mounted on the forward part of the vessel," that the ammunition is small, that the vessel is manned by its usual crew, that its fuel and supplies are sufficient to carry it only to its port of destination, etc. The New York Times, Dec. 2, 1939, reports that Rumania has forbidden access to its ports or territorial waters to all belligerent ships armed with more than two six-inch guns. The dispatch adds that "the armament . . . must be for defense purposes only, and this fact must be obvious." No test for determining this "obvious" fact is suggested. Belgium, Denmark, Norway, Sweden, and Iceland appear to admit belligerent merchant ships armed for "defense." The uniform Scandinavian laws give no definition. French texts quoted (1939) 15 *Revue des lois (Inst. Int. du Commerce)*, 213-214.

orders had been issued to armed ships to ram and attack submarines, no change was suggested in the American rules for distinguishing offensive from defensive armament until the end of 1915, when Mr. Lansing informed the British Government that arms had been used "for offensive purposes in attacks upon submarines," and the Italian Ambassador that "the presence of any gun on a merchant ship of a belligerent nationality could well create the presumption that the armament was for offensive purposes, thereby causing this Government to treat the ship as a ship of war."⁴ On January 2, 1916, Mr. Lansing pointed out to the President the necessity of reversing the 1914 ruling because of "the impossibility of a submarine's communicating with an armed merchant ship without exposing itself to the gravest danger of being sunk by gunfire because of its weakness defensively [and] the unreasonableness of requiring a submarine to run the danger of being almost certainly destroyed by giving warning to a vessel carrying an armament . . ."⁵ He suggested, therefore, that merchant vessels disarm, but if they would not, they were to be classed as "vessels of war and liable to treatment as such by both belligerents and neutrals." The Netherlands had realized this elementary principle as early as 1914,⁶ and refused to admit to Dutch ports armed belligerent merchantmen, on the ground that they were capable of committing "acts of war." Moreover, Mr. Lansing pointed out that if some merchant vessels are armed, all expose themselves to the danger of unwarned attack and sinking.⁷

(On January 18, 1916, Mr. Lansing made a restatement of the law, pointed out that the reason for defensive armaments was the menace of pirates and privateers, and that with the disappearance of these dangers a gun on a merchant ship today could only be considered as intended for the purpose of conducting hostilities against submarines and preventing visit and search. He said:

Even a merchant ship carrying a small caliber gun would be able to use it effectively for offense against a submarine. Moreover, pirates and sea rovers have been swept from the main trade channels of the seas, and privateering has been abolished. Consequently, the placing of guns on merchantmen at the present day of submarine warfare can be explained only on the ground of a purpose to render merchantmen superior in force to submarines and to prevent warning and visit and search by them. Any armament, therefore, on a merchant vessel would seem to have the character of an offensive armament.⁸

He therefore proposed "that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatever."

⁴ For. Rel., 1915, Supp., 849-850; 1916, Supp., 749.

⁵ Savage, *The Policy of the United States Toward Maritime Commerce in War*, Doc. No. 149, II, 430, 431.

⁶ The correspondence between British and Dutch Governments will be found in a British Blue Book, reprinted in this JOURNAL, Supp., Vol. 12 (1918), p. 197 *et seq.*

⁷ Savage, *op. cit.*, 431-432.

⁸ For. Rel., 1916, Supp., 147.

In advancing this argument, Mr. Lansing announced no new principle of law. The immunity of the merchant ship from unwarned attack was directly associated with its inability to attack or endanger a warship. This disability became marked when armor-plate was introduced on warships. But when merchant ships became speedy, powerful and armed and the vulnerable submarine appeared on the scene, the reason for immunity from unwarned attack disappeared. It is elementary that an armed belligerent merchant ship, especially when under orders to attack submarines at sight, is a fighting ship, subject to all the dangers of the belligerent character, as Marshall remarked in *The Nereide*.⁹

But Mr. Lansing's sound legal view was, for political reasons, not to prevail. Had it been adopted and adhered to, it might have saved the Wilson Administration from the fatal claim that an American citizen had the right to travel unmolested on an armed belligerent ship, which Mr. Wilson considered a matter of "national honor." Mr. Lansing's view, although at first accepted by the President, was later rejected under a barrage of Allied protest. Mr. Lansing, having started out in error, was not permitted to get back on the right track. The Administration then opposed the sensible Gore-McLemore Resolutions, which would have warned American citizens against taking passage on armed belligerent merchantmen except at their own risk.¹⁰ This common law rule really required no statutory codification. A memorandum dated March 4, 1916, was solicited from anonymous "experts," who rationalized the confessed error of September 19, 1914, and in effect maintained the view that passengers could grant immunity from sinking to an armed merchant ship.¹¹ Then came the humiliating retreat of March 25, 1916, in which Lansing undertook to repudiate his and the

⁹ 9 Cranch 388, at 430 (1815). It has been assumed by some defenders of armament on merchant vessels that Marshall did not believe that the armament exposed the vessel and her neutral cargo to the danger of sinking. But this hardly does credit to Marshall's intelligence. After the ship was captured—not sunk—he held, contrary to Stowell's view in *The Fanny* (1814), Dobson, 443, 448, Moore's Dig., VII, 491, that neutral cargo was immune from condemnation, notwithstanding the risks its carrier had run. The court divided 3 to 2 on that issue; but we know that Marshall was anxious to preserve and extend the rights of neutrals. Privateers did not sink prizes unless absolutely necessary, for obvious reasons; and privateers were occasionally themselves captured or sunk by armed merchantmen. All the judges agreed that the *Nereide*, armed with ten guns, could have made lawful captures. Clearly, then, she was subject to the danger of being sunk, even if only while attempting to escape the privateer. Nothing else could have been meant by Marshall when he speaks of the *Nereide* as "an open and declared belligerent, claiming all the rights and subject to all the dangers of the belligerent character." Cf. John Bassett Moore, "Fifty Years of International Law," 50 Harv. L. Rev. 395, at 437-442 (1937). Professor Hyde states that Lansing merely applied an old rule to existing conditions. International Law, II, 467. On the history of arming merchantmen, see Vivaud, Jean, *Les navires de commerce armés pour leur défense* (Paris, 1936), p. 15 *et seq.*

¹⁰ The two resolutions differed somewhat. Cf. Borchard and Lage, *Neutrality for the United States*, 113-117.

¹¹ That memorandum has been criticized in Borchard and Lage, *op. cit.*, 117 *et seq.*

President's view of January 18, 1916, and now maintained that a belligerent must, in the absence of "conclusive evidence of aggressive purpose," act on the presumption that an armed enemy merchantman is of "private and peaceful" character, entitled to all the immunities of an unarmed vessel. Conclusive evidence of a purpose to use the armament for "aggression" was to be deemed essential. The distinction between "offensive" and "defensive" armament, which Lansing had exposed as an illusion, was now revived in the fantastic contrast between merchantmen armed "for aggressive purposes," and "peaceful armed merchantmen." This extraordinary position, repudiated by Congress since 1935 in the general prohibition against traveling on any belligerent vessels, has been severely criticized not only by Mr. Lansing himself in his note of January 18, 1916, but by informed commentators.¹²

Yet there is danger that the unsustainable claim that armed merchant vessels are peaceful if armed for "defensive purposes," a claim directly responsible for American entrance into the war in 1917, is now being again acted upon. Although Mr. Lansing in 1915 protested against the admission of such ships to American ports, they are now apparently freely admitted though armed fore and aft. While the Washington Conference of 1922 condemned the sinking of merchantmen without provision for the safety of noncombatants, it also recognized that submarines are lawful naval vessels, that a merchant vessel must be ordered to submit to visit and search, that it must not be attacked unless it refuses to submit, that it may not be destroyed unless crew and passengers have first been placed in safety, and that submarines are not exempt from these rules. But if merchant vessels may be attacked if they resist visit and search, how can it be maintained that a merchant vessel may carry armament whose sole purpose is to prevent visit and actually to attack the submarines on sight, and yet escape the danger of unwarned sinking?¹³ The gun, as Mr. Lansing pointed out, precludes

¹² See Hyde, *International Law*, II, 469-472. Art. 28 of the *Research in International Law* (1939) provides:

"A neutral State shall either exclude belligerent armed merchant vessels from its territory or admit such vessels on the same conditions on which it admits belligerent warships." See also Art. 2 and comment. *This JOURNAL*, Supp., Vol. 33 (July, 1939), pp. 224 *et seq.*, 335 *et seq.*

¹³ An officer of the armed Anchor Liner *Cameronia*, remarking on the fact that she had been repainted a buff color to mislead German submarines into thinking her a neutral ship, is reported to have said, "They have to come up to us to make certain, and then we'll let them have it." *New York Times*, Nov. 15, 1939. Mr. Bryan, on June 2, 1915, then at odds with Mr. Lansing on the armed ship question, advised President Wilson, correctly, that "the character of the vessel is determined, not by whether she resists or not, but by whether she is armed or not . . . the fact that she is armed raising the presumption that she will use her arms." Baker, *Woodrow Wilson, Life and Letters*, V, 354, quoted in article of J. B. Moore, *loc. cit.*, p. 439.

The 6-inch gun is a heavy gun. At the Washington Conference it was agreed that no warships should be built, other than battleships, with gun caliber over 8 inches. Article

any possibility of visit. This must have been foreseen by Article 22 of the London Naval Treaty of 1930 which prohibits sinking of merchant vessels without provision for the safety of passengers and crew, "except in case of persistent refusal to stop on being duly summoned, or of active resistance to visit and search."¹⁴ As already observed, (the 1928 Havana Convention treats armed merchantmen as having the status of warships.) The Panama Declaration, to the contrary, is hard to understand on legal grounds, and it will be interesting to observe how neutrals act under it. But whether regarded from the point of view of the "Alabama" principles or from the point of view of protecting goods or passengers on board, neutrals are not justified in treating an armed merchant vessel as an innocent peaceful carrier. By so doing they risk their neutrality.

EDWIN BORCHARD

PROTECTIVE JURISDICTION

(The "Declaration of Panama" signed October 3, 1939, by the representatives of the twenty-one American Republics,¹ which proclaimed a non-combat zone of vast extent in the seas adjacent to the Western Hemisphere, is of vast import.) It is true that official explanations and interpretations by the Department of State have sought to attenuate the practical effect of this Declaration. Nevertheless, this Declaration raises issues of the deepest significance. It plainly puts fresh vigor into the Monroe Doctrine as a continental policy rather than a unilateral policy on the part of the United States. It confirms the claim made by certain publicists, notably Dr. Alejandro Alvarez of Chile, that there exists a growing body of American continental international law. It asserts a definite limitation on the ancient doctrine of the freedom of the seas. It gives formal and solemn sanction to the doctrine of protective jurisdiction over waters extending beyond the conventional three-mile limit of sovereign territorial jurisdiction.)

The text of the Declaration of Panama affirming the neutrality of the American Republics in the present European war, and denying that the interests of belligerents should be permitted to prevail over the rights of neutrals remote from the zone of combat, reads in part as follows:

XII of General Convention, Proceedings, p. 1580. All but the heaviest British cruisers carry a maximum caliber gun of 6 inches. Cf. 1935 Naval Conference, Documents, pp. 806, 811, 851. The *Ajax* and the *Achilles*, which placed the *Graf von Spee* hors de combat, carried 6-inch guns as a maximum.

¹⁴ These rules came into force for the United States, Great Britain and Japan. Proceedings of the London Conference, 1930, Conf. Ser., No. 6 (Washington, 1931), Art. 24 (2), p. 219; Hazlett, Submarines and the London Treaty (1936), U. S. Naval Inst., Proc., p. 1691. Even the 1936 Naval Treaty, now subscribed by France and Italy and many other countries, cannot be deemed to have extended these immunities to armed merchant vessels. Cf. Borchard and Lage, *op. cit.*, pp. 193-196.

¹ Printed in Supplement to this JOURNAL, p. 17.

The nature of the present conflagration, in spite of its already lamentable proportions, would not justify any obstruction to inter-American communications, which, engendered by important interests, call for adequate protection. This fact requires the demarcation of a zone of security including all the normal maritime routes of communication and trade between the countries of America.

There is no doubt that the Governments of the American Republics must foresee these dangers and as a measure of self-protection insist that the waters to a reasonable distance from their coasts shall remain free from the commission of hostile acts or from the undertaking of belligerent activities by nations engaged in a war in which the said governments are not involved.

For these reasons the Governments of the American Republics resolve and hereby declare:

1. As a measure of continental self-protection the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard of primary concern and direct utility in their relations, free from the commission of any hostile acts by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea or air.

The Declaration goes on to define in precise terms of longitude and latitude the extent of these "waters adjacent to the American continent," embracing in some instances a zone more than three hundred miles from the coasts. It was further agreed that these waters should be patrolled, and that the signatory Powers should consult in an emergency concerning the "measures which they may individually or collectively undertake in order to secure the observance of the provisions of this Declaration."

While it may be reasonably demanded that, if American neutral nations are willing to accept severe restrictions on their rights within the European zone of combat, the belligerent Powers should in all fairness respect this neutral non-combat zone, these latter Powers, in certain unforeseen contingencies, might resent any patrol of the character contemplated by the Declaration. The United States would obviously be presented with a most embarrassing problem should Germany repeat the operations of the submarine U-53, when, in October, 1916, it sunk two British and two neutral merchant ships in the neighborhood of the Nantucket lightship, about twelve miles from land.

It is quite possible that serious incidents and complications may arise in the practical application of the Declaration of Panama. We are not concerned, however, with speculations concerning methods and consequences of the enforcement of the principle of international law enunciated by the Declaration. We are concerned solely with the question of the validity of that principle. The validity of a rule of law is not to be determined arbitrarily by law-breakers. Most laws encounter difficulties in enforcement,

and redress for violations not infrequently is long delayed. But the principle itself, unless generally repudiated or specifically denied, remains intact.

We may confidently assert that the principle of protective jurisdiction enunciated in the Declaration of Panama has never been repudiated in international law and practice. On the contrary, the consensus of opinion, as well as of practice, overwhelmingly sustains the right of every nation to defend its laws and security from threatened violations, under varying circumstances, in the waters contiguous to the conventional three-mile limit, within which municipal law is supreme. In spite of legalistic arguments of a technical nature and contradictory claims of an opportunistic character made by statesmen and diplomats in special disputes, the right of protective jurisdiction has been generally conceded. These special disputes concerning the protection of valuable fisheries, the suppression of smuggling, the prevention of filibustering, and the enforcement of neutrality inevitably have created serious difficulties. The United States Government, in order to minimize the difficulties in the enforcement of its laws against rum-running, preferred to obtain by treaty the implied recognition of the principle of protective jurisdiction. When Great Britain and other Powers acknowledged the right of the United States to capture rum-runners within an hour's sailing distance of its coasts they were merely recognizing the basic sovereign right of every nation to protect itself over an undefinable zone outside conventional territorial waters. Any attempt to define this zone in terms of geographical or marine miles to cover all contingencies is obviously as futile as it is illogical. Distance does not determine the principle, though the principle may determine the distance. Questions concerning the extent of the zone of protective jurisdiction and the methods to be employed can only be answered by the rule of reason in each individual case. And it also follows that any abuse of the exercise of this right calls for proper reparation.

Recent comprehensive surveys of precedents and the opinions of publicists, jurists and statesmen, which have been made by such competent authorities as Professor Philip C. Jessup, Professor Gilbert Gidel, and William E. Masterson, prove conclusively that the principle of protective jurisdiction has become firmly established in international law and practice. They also show that the three-mile limit of territorial jurisdiction has never been accepted as a universal limitation, and that it should be regarded as a minimum, and not as a maximum restriction. It must suffice for the purpose of the present comment to cite a few leading declarations on the subject.

The *Institut de Droit International* declared in 1894 that there was no reason "to confound in a single zone the distance necessary for the exercise of sovereignty and for the protection of coastwise fishing and that which is necessary to guarantee the neutrality of non-belligerents in time of war."² And the *Institut* at its session in Stockholm in 1928 further declared in Article 12 of the *projet—La Mer Territoriale en temps de Paix*:

² See James Brown Scott, *Resolutions of the Institute of International Law*, p. 113.

Dans une zone supplémentaire contiguë à la Mer Territoriale, l'Etat côtier peut prendre les mesures nécessaires à sa sécurité, au respect de sa neutralité, à la police sanitaire, douanière, et de la pêche. Il est compétent pour connaître, dans cette zone supplémentaire, des infractions aux lois et règlements concernant ces matières.

L'étendue de la zone supplémentaire ne peut dépasser neuf milles marins.³

✓ The Committee of Experts for the Progressive Codification of International Law, appointed by the League of Nations, recommended that:

The zone of the coastal sea shall extend for three marine miles (60 to the degree of latitude) from the low-water mark along the whole of the coast. Beyond the zone of sovereignty, States may exercise administrative rights on the ground of custom or of vital interest. There are included the rights of jurisdiction necessary for their protection.⁴

The American Institute of International Law declared in its Draft Convention of 1926, Article 12:

The American Republics may extend their jurisdiction beyond the territorial sea . . . for a supplementary distance of . . . marine miles, for reasons of security and in order to ensure the enforcement of sanitary and customs regulations.⁵

The Harvard Research in International Law in Article 2 of its Draft Convention on Territorial Waters recommended that "On the high sea adjacent to the marginal sea . . . a state may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary or police laws or regulations, or for its immediate protection."⁶ The accompanying comment on this article states:

It would seem to serve no useful purpose to attempt to state what is adjacent in terms of miles, as the powers described in this article are not dependent upon sovereignty over the *locus* and are not limited to a geographical area which can be thus defined. The distance from shore at which these powers may be exercised is determined not by mileage but by the necessity of the littoral state and by the connection between the interests of its territory and the acts performed on the high sea.⁷

The principle of protective jurisdiction was expressly embodied in the Draft Convention on Territorial Waters presented by the Preparatory Commission for the Conference on the Codification of International Law held at The Hague in 1930. Professor Jesse S. Reeves, who served as technical adviser to the American delegation to this conference, makes the following comment:

The states which did not express a desire for a contiguous zone for one purpose or another formed a small minority. The purposes for which

³ See *Annuaire* of the Institute for 1928.

⁴ This JOURNAL, Special Supplement, Vol. 20 (1926), p. 141.

⁵ *Ibid.*, p. 324.

⁶ *Ibid.*, Vol. 23 (1929), p. 333.

⁷ *Ibid.*, p. 334.

a zone should be recognized, and the measures of jurisdiction over such a zone to be exercised by the littoral state involved great divergencies. Enforcement of customs legislation, supervision and even control over fisheries, and security to the littoral state were the main foundation for the theory of the contiguous zone, insistence upon one or another depending upon the policy or point of view of particular states.³

In the light of this formidable consensus of opinion in favor of the principle of protective jurisdiction, the Declaration of Panama deserves most serious attention and consideration. It may be argued that it has unwarrantably extended the right claimed by the American Republics to safeguard themselves from the dangers of the present war in Europe. The Declaration may never be applied effectively. Nevertheless, it has enunciated and given weighty sanction to a basic right under international law which may not lightly be denied or infringed.

PHILIP MARSHALL BROWN

THE DECLARATION OF PANAMA

Serious misgivings appear to have arisen among a number of international lawyers as to the legal merits of the provisions of the Declaration of Panama.¹ They seem to feel that in drawing up the Declaration the American Republics over-stepped themselves; that they asserted rights for which there is no foundation at international law; that they put unwarranted restraints upon belligerent rights; that they were even guilty of encroaching upon the "freedom of the seas," which is held to be as sacred for those who want to use the seas for belligerent operations as for those who want to use them for peaceful commerce. More fatal even than the legal defects of the Declaration is said to be the fact that it cannot be enforced; and being unenforceable, the Declaration can only serve to weaken what little respect is left for the true rights of neutrals.

The objections are not all of equal weight, and some of them are based upon a misconception of the terms of the Declaration. The assertion that it is not permissible to change the rules of neutrality in time of war and that, however good a case the American Republics may have for insisting upon a change, they must wait until the war is over and then proceed to revise the rules of neutrality to be applied in the next war, hardly deserves notice. For if anything is clear from the history of international relations, it is that belligerents are constantly introducing new instruments and new methods of warfare during the progress of the war, many of which bear heavily upon neutrals and restrict more and more their normal relations of social and commercial intercourse, not only with the opposing belligerent, but with neutral states as well. With equal justification may neutral states seek by individual and by collective action to protect themselves against the impending ravages of a war while it is still in progress.

³ "The Codification of International Law," this JOURNAL, Vol. 24 (1930), p. 494.

¹ Printed in Supplement to this JOURNAL, p. 17.

It has been objected that the assertion in the Declaration of an "inherent right" on the part of the American Republics to have the waters adjacent to the American continents free from the commission of hostile acts is a somewhat naïve attempt to create new "natural law rights" which are obviously in conflict with the positive rules of international law and, therefore, tend to weaken the force of existing rules, such as they are. The objection does undue honor to the conception of "positive law." International law had its origin in rules of "right reason." Many of the rules now accepted as positive law began as assertions of inherent right which in the course of time came to be generally accepted by all nations as binding obligations. Moreover, it is clear that the American Republics, in stating their claim to the security zone as an inherent right, were aware that they could not demand the same respect for it as for the older rights of neutrals embodied, for example, in the Hague Conventions of 1907. For that reason Article 2 of the Declaration announces that the American Republics will endeavor through joint representations to the belligerents "to secure the compliance by them with the provisions of the Declaration." This should dispose of the objection that the Declaration, by asserting natural rights not recognized by international law, is likely to involve the American Republics in controversies with the belligerents and thus endanger the very neutral position which they are attempting to protect. The Declaration of Panama states a new rule of neutral security, a rule justified by its inherent reasonableness and proposed to the belligerents as such; but nevertheless a rule which the American Republics intend to get observed by recourse if necessary to "certain measures" yet to be determined by consultation. The reference to these measures contains no threat of force, and there is no ground for reading such a threat between the lines of the text.

It may be implied from the terms of the Declaration that at the present stage the American Republics do not ask that one of the belligerents should respect the security zone unless the other belligerent on its part respects it. Hence it is to be expected that if a warship of one belligerent were to attack a warship of the other belligerent within the security zone, the latter would defend itself. The problem of determining in such case which belligerent took the initiative would be a practical rather than a legal question. No provision is made in the Declaration to meet the case of a battle begun outside of the security zone and continued within it, or for the case of the hot pursuit of a vessel sighted outside the zone and taking refuge within it—points which will no doubt be covered by the regulations to be recommended at the coming meeting of the Inter-American Neutrality Committee.

The objection that the Declaration of Panama cannot be enforced and, therefore, had better not have been made, leads to a consideration of the character of the "measures" to secure the observance of the Declaration referred to in the third article. Dismissing any suggestion of the use of naval force as wholly incompatible with the spirit of the Declaration, there arises the question of the possible denial of privileges of port to vessels com-

mitting acts of hostility within the forbidden zone, as suggested in the protest made on December 23 against the violation of the zone in the *Graf Spee* case. Here we are confronted with a problem of neutral duty as well as of neutral right. For it would seem clear that if the American Republics are to expect the belligerents to renounce hostile operations within the security zone, they must on their part see to it that not only their ports but the security zone itself be not allowed to become a base of naval operations for one belligerent against the other. This may conceivably call for consideration of possible additional steps by the American Republics, such as an extension of the established three-months limit on refueling, so that the limitation now operating against a single state may be made to operate for the American Republics as a unit. Again, it doubtless will be necessary to take measures to insure that goods are actually delivered at their port of alleged destination, possibly by the requirement of a bond in cases open to suspicion, in order to make certain that vessels ostensibly engaged in normal commerce may not actually be serving as auxiliary transports.

In the General Declaration of Neutrality of the American Republics,² adopted on the same day as the Declaration of Panama, the Meeting of the Foreign Ministers declared that there existed "certain standards" of neutral conduct which it was incumbent upon them to observe if they were to have their neutral status respected. In accordance with these standards a number of specific regulations were laid down, the strict observance of which should go far towards preventing any abuse of the security zone by one belligerent as against the other. These rules have yet to be made more precise and definite by the unanimous agreement of the Governments of the American Republics, and the Inter-American Neutrality Committee which is to meet at Rio de Janeiro on January 15, will doubtless consider other ways and means of meeting any complaint on the part of belligerents that the security zone is being used by the enemy in order to carry on its naval operations more effectively.

What of the width of the zone which, it is alleged, goes far beyond the "reasonable distance from their coasts" within which the Governments of the American Republics asserted that their waters should be free from the commission of hostile acts? If the average distance of 300 miles should seem at first sight to be excessive, it should be observed that the American Republics were seeking not only to prevent the commission of hostilities so close to their shores as to endanger coastal towns and local shipping, but to prevent any "obstruction to inter-American communications." Hence the zone was delimited so as to include "all the normal maritime routes of communication and trade between the countries of America." The demarcation of a narrower zone which, taking into account the greater carrying distance of modern guns, might still have protected local shipping and fisheries, would have been open to substantially the same objections from the belligerents, while greatly increasing the inconvenience and dangers to neutral shipping.

² Printed in Supplement to this JOURNAL, p. 9.

The one justifiable ground of belligerent complaint, that the American States will be unable to patrol so wide a zone and that belligerent acts may be *de facto* committed within it in spite of its proclamation, is met by the implied recognition by the American States that the abuse of the zone by one belligerent will release the other from the observance of it, at least with respect to the particular abuse. In such case neither belligerent will be substantially worse off than it was before.

The events of the present war only confirm the experience of previous wars that belligerents, with their backs to the wall and their national existence at stake, will seek to extend in every possible way such rights as the traditional law accords them and will make every change of circumstances an occasion for restricting further the trade of neutrals with the enemy, even to the extent of closing the highways of neutral commerce with other neutrals. It would seem equitable, therefore, that neutrals on their part should seek to limit the zones of combat and should, as in the case of the American Republics, bring their collective weight to secure the peace and safety of their continental waters far remote from the immediate theater of hostilities. If in so doing they should find it necessary to close their ports to belligerents which are unwilling to respect their claim, or even to discriminate against one that refuses in favor of one that agrees to respect it, no legal ground of complaint can arise. For the privilege of admission to neutral ports is not one that belligerents can claim as of absolute right; rather it is a concession which the neutral may grant or withhold, subject only to the condition that whatever discrimination against one or other of the belligerents it may be led to resort to shall be based not upon an arbitrary partiality, but upon the protection of its own national interests.

It is of interest to note that the meeting of the Foreign Ministers at Panama was the first application in inter-American relations of the procedure of consultation established in agreements signed in 1936 at Buenos Aires at the Inter-American Conference for the Maintenance of Peace and in 1938 at Lima at the Eighth International Conference of American States. While the Declaration of Panama does not fit precisely into the purposes contemplated at Buenos Aires, when the American Republics planned to adopt "in their character as neutrals a common and solidary attitude," it nevertheless gives proof of the new spirit of continental collaboration that has marked the relations between the American Republics of recent years. The rapidity with which it proved possible to hold the meeting of Foreign Ministers gives promise that the procedure of consultation may become in the future an even more effective agency of common action in the presence of emergencies.

C. G. FENWICK

COLLECTING ON DEFAULTED FOREIGN DOLLAR BONDS

The Foreign Bondholders Protective Council, Inc., was organized in December, 1933, for the purpose of securing resumption of service—interest and amortization—on defaulted foreign dollar bonds then amounting to about

\$2,500,000,000 issued by some 23 countries. The Council concluded its first negotiations in February, 1934. Since then there has been actually paid to American bondholders, on account of the interest only of such defaulted bonds, \$103,938,000 in cash and \$37,204,000 in scrip—a grand total of \$141,142,000. This has been done on a total expense account for the Council (covering the whole of the Council's work) of thirty-four hundredths of one per cent (.0034%) on the amount of interest so actually paid to bondholders, or of twenty-seven thousandths of one per cent (.00027%) on the face value of the bonds concerning which the Council has negotiated. It may be added that of the total sum of \$2,500,000,000 of defaulted bonds, the Council has since its organization negotiated regarding the resumption, continuance, or increase of service on over \$1,773,000,000. Of this sum, permanent settlements were arranged as to \$245,000,000 and temporary settlements covering \$1,528,000,000.

The Council was formed by a group of gentlemen who had been personally requested to set it up by the Honorable Cordell Hull, Secretary of State, the Honorable William H. Woodin, Secretary of the Treasury, and the Honorable Charles H. March, Chairman of the Federal Trade Commission. It was created in lieu of the organization of the Corporation of Foreign Security Holders provided in Title 2 of the Securities Act of 1933,¹ after the Administration had determined not to establish that body.

Following a meeting between President Roosevelt and the organizers in October, 1933, the White House issued a formal statement approving the creation of the Council, stating the need therefor, and outlining certain general principles that should govern its work. The Council was not to be a profit organization, was to carry on at the lowest possible expense to the bondholders, was to decide its own affairs independently, and Administration officials were stated to "have no intention, however, of seeking governmental direction or control of the organization, nor will they assume responsibility for its actions." The Council has carried on its work in accordance with these principles.

The Council does not represent the bondholders legally. It cannot negotiate settlements that are binding upon them. It has never called for deposits of bonds. The regular procedure of negotiation by the Council is this: It approaches the defaulting debtor on dollar bonds in an effort to induce it to resume or to increase its interest and sinking fund service on its bonds in accordance with the bond contract. Whenever the defaulting debtor can be so induced, the Council enters into negotiations with the debtor to secure from it the best possible offer of service. When the debtor makes the offer, the Council follows one of three courses: it tells the bondholders the offer is fair and equitable under all the circumstances, if in the Council's judgment such are the facts; or if the Council believes the offer is unfair, it tells the bondholders so, and may recommend against the acceptance of the offer by the bondholders; or the Council may pass the offer

¹ 48 U. S. Stat. L., p. 92.

on to the bondholders without any expression of opinion. In no event is the bondholder bound either to accept or reject the offer; he is in no way committed either for or against the offer; he makes his own decision about it. The offers arranged for by the Council always run to each and every bondholder, and not to a selected group only.

Believing that the world-wide depression made it undesirable, both for the bondholder and the defaulting debtor, to attempt to make final arrangements on the debt, the Council has endeavored to get the defaulting debtors to offer a temporary service covering a few years, the permanent settlement to come later when the condition of the world became more normal. However, some of the debtors have insisted on permanent arrangements now, seemingly in the belief that the present was their most opportune time for adjustments.

Of the approximately \$2,500,000,000 foreign dollar bonds in default when the Council was organized, approximately \$1,200,000,000 were Latin American dollar bonds, and \$1,300,000,000 were European dollar bonds.

The following table shows the approximate amount of interest service, both cash and bonds (funding) which were offered to holders as the result of either temporary or permanent adjustments negotiated by the Council from the time of its organization up to the end of 1939. These figures do not include sinking fund payments made under any plan, but merely those payments made for interest.

	<i>Outstanding When Adjusted *</i>	<i>Period for Which Interest Was Offered</i>	<i>Cash</i>	<i>Bonds</i>
Brasil (temporary).....	\$ 875,965,035	3-3½ yrs.	\$ 32,678,707	
Germany (temporary).....	1,066,786,000	1 yr.	32,840,000 (a)	
Germany (temporary).....		2½ yrs.	1,759,950 (b)	\$29,832,500 (c)
Dominican Republic (permanent).....	16,292,500	5½ yrs.	4,810,095	
Buenos Aires (permanent).....	72,605,424	4 yrs.	10,489,968	
Costa Rica (two temporary).....	10,489,351	2-2½ yrs.	519,863	
China—Treasury notes (permanent).....	5,500,000	2½ yrs. (d)	343,750	1,058,750
China—Hukuang (permanent).....	7,500,000	2 yrs.	375,000 (e)
Hungary—non-State (temporary).....	11,468,000	2-2½ yrs.	436,741	
Cuban Public Works (permanent).....	40,000,000	3½ yrs. (f)	4,450,250	3,476,800
Yugoslavia (two temporary).....	42,366,300	3-4 yrs.	4,111,594	2,890,000
Poland (two temporary and one permanent), including Silesia and Warsaw.....	53,851,980	1 yr. (h) } 7 mos. (i) } 1½ yrs. (j) }	3,456,475	440,000
Uruguay (permanent).....	52,947,500	2 yrs.	3,989,125	
Montevideo (permanent).....	4,863,500	2 yrs.	360,982	6,443
Mendoza (permanent).....	4,327,000	2½ yrs.	342,400	
Santa Fé, Province and City (permanent)..<	8,859,200	1 yr.	354,368	
	\$1,773,821,790		\$103,938,147	\$37,204,493

* Where there are more than one adjustment, the amounts given are for the earliest one.

(a) Based on \$1,066,786,000—the figure given in February, 1934, as then outstanding.

(b) Received as 3% interest on \$29,832,500 funding bonds.

(c) Amount issued only.

(d) Cash for 2½ yrs.; scrip for short-fall during 2½ yrs. and for 15 yrs. back interest at 1%.

(e) Scrip to be, but not yet, issued. \$562,500 for short-fall during 2-yr. period and for 8½ yrs. back interest at 1%.

(f) Cash for 2½ yrs.; bonds for 4 yrs.

(g) Amount outstanding under temporary adjustments; \$41,185,400 under permanent adjustment.

(h) 1 yr. under first temporary plan.

(i) 7 mos. under second temporary plan.

(j) 1½ yrs. under permanent plan.

It is of interest to note that on the permanent settlements, the average annual interest rate return (at the lowest rate called for under the adjustment plans) has been approximately 4.3%; the sinking fund arrangement has been approximately 1.2%, or a total service of 5.5% per annum.

To meet the expense of all of this work, the Council has spent approximately \$80,000 per year, including rent, clerical help, supplies, preparation and printing of the Annual Report, statistical service, telephone, telegraph, traveling expenses, negotiation expenses, officers' salaries, and all incidental costs whatever.

Being a strictly non-profit organization and having neither capital stock nor assets, the Council has found difficulty in financing itself. Failing to get some sort of endowment, it turned to the issue houses and banks on the theory that as they had profited by the issuance of the bonds they should contribute to the protection of the rights of the bondholders. This plan had the express approval of the Administration. Later the Securities and Exchange Commission condemned this plan, and the Council then turned to the bondholders (from whom it has asked $\frac{1}{8}$ of 1% of the face value of the bonds on which it has arranged permanent settlements), and to the debtor states on the theory that a debtor should bear at least a portion of the costs of refinancing. The bondholders have in largest part generously responded, though some (largely foreign holders, American speculators, and arbitrageurs) have accepted the benefits of the Council's work but have refused to contribute to its support. To remedy this situation the Board of Visitors (named by the Secretary of State and the Chairman of the Securities and Exchange Commission at the request of the Council) have approved a levy (the maximum being $\frac{1}{8}$ of 1%) on all bonds participating in any adjustment.

Speaking generally, defaulting debtors on dollar bonds, are defaulting, not because they are unable to pay all or a good part of their debt service, but simply because they do not have the will to pay. For example, one country in total default on its dollar bonds since 1932 and 1935, had, during the seven years of default, a favorable trade balance with the United States of approximately three times the amount of the full contract interest service on their dollar bonds, yet during all this time it refused either to serve its bonds or seriously to discuss service, though paying full service on its total internal debt, even up to 10% per annum. Other cases are almost as flagrant. Six Latin American countries having a favorable balance of trade with the United States in 1938 made no interest payments on their bonds for that year. In contrast with that, four countries—Argentina, Dominican Republic, Haiti, and Uruguay—had unfavorable balances of trade with the United States for 1938, and yet paid full bond interest for that period. There are some defaulting debtors who will make no adequate service, if any at all, upon their defaulted dollar bonds, except under governmental pressure.

In its work the Council has at all times applied certain principles. It has steadily refused to discuss or even listen to arguments to the point that the principal amount of the bonds should be reduced, or that adjustments should be made that would in effect constitute a reduction. The Council's files contain great numbers of letters showing that there are thousands, if not hundreds of thousands, of bondholders who bought their bonds at the original issue prices. These are in great part aged people who invested their life savings in "government gold bonds" frequently under a sales representation that they were "better than money in the bank," because the bonds drew a high interest rate, and bank balances drew a low interest rate. These people write from hospitals, infirmaries, county poor houses, and bare homes. They say these bonds represent all they have in the world. The Council has refused to sacrifice the rights and necessities of these American citizens to the interests of defaulting debtors, able to pay and lacking only the will so to do.

One of the iniquities of the existing condition of foreign dollar bond defaults is this: while governments allege they are unable to find either funds or dollar exchange to pay the interest and sinking fund on their bonds, nevertheless, such governments (many, and indeed most of them) have been able to find both funds and dollar exchange to buy up in our markets their own bonds at the very low prices at which the bonds are selling due to their own wilful default. The Council has complained and inveighed against this in vain. In its 1937 Report the Council said:

Because of the character of such a transaction as this repatriation of defaulted bonds, the participants therein do not usually disclose the extent of their operations, and it is therefore difficult to obtain accurate figures regarding the extent of the operation. But from such fragmentary information as the Council can secure it would seem that some municipal defaulters have bought up while in continuous default, as much as 83.5% of their indebtedness outstanding at the time of default; one country with an outstanding indebtedness at the time of default of over 850 millions, has repatriated, at default prices, approximately $\frac{1}{8}$ of the debt. Thirteen countries in default (on which fairly accurate data have been obtained) had at the time of default approximately \$1,815,347,000 of dollar debt outstanding. These countries have in some 7 years repatriated approximately 25% of this debt, though all the time alleging they had not available funds or exchange to serve their bonds.

Government estimates indicate that almost a dozen countries in default in service payments on their dollar bonds, most of them alleging as a reason for their default a lack of dollar exchange, have been able to find enough of that exchange to repatriate from 15% to 50% of their outstanding dollar issues.

Another contention which defaulting debtors frequently make is that their bonds are in the hands of holders who have bought them at the low

prices existing since default, and therefore that the interest should be cut to what would be a fair return upon the price actually paid. The Council has refused to yield to this argument because, first, of the great injustice it would work on the original holders (already referred to), and next because it considers dishonest an argument by a debtor which would put a premium upon his own wilful default.

In this connection the Council has had constantly in mind that there is a certain fundamental difference between enterprises and investments made by Americans in the United States and the same sort of operations undertaken by them in foreign countries. Where the enterprise is domestic, the national wealth is not much concerned with who, among the people of the United States, shall gain or lose with reference to that enterprise. If "A" loses to "B" in such an investment, the property being still in the United States, the national wealth is not in any way impaired. However, where the American capital is invested in bonds of a foreign country the situation is wholly different. This bond investment is an outlay of the national wealth which is lodged in the foreign country. If the investment is not returned to the United States, the national wealth has been by that much depleted. For example, a foreign government borrowing a dollar and paying back 20¢ (on the theory that since the particular holder of the obligation at the time of payment had paid only 20¢ for it, the debtor should be able to wipe out his obligation by the payment of the 20¢), would deplete the national wealth by 80¢ for every dollar which had been originally invested.

One of the considerations most frequently urged upon the Council in connection with an application to reduce either the principal sum of indebtedness or the service (interest and amortization) thereon, has been that of "capacity to pay" which is, in fact, brought forward rather as *incapacity to pay*. This is frequently urged by debtors whose revenues are approximately at the same height as when the loans were made, but whose expenditures have enormously increased, either for war equipment or for the frills of modern governmental activities. It will be recalled that the phrase originated in a discussion between sovereigns with reference to obligations running between them, and arising out of a joint partnership, political operation, for political purposes, the World War. If these sovereigns, in such a discussion, wished in adjusting their sovereign debts to take account of the relative "capacity to pay" of the sovereign debtors, their partners in the joint enterprise, such was their sovereign privilege. They were dealing as equals about their own debts, and could, with reference thereto, be generous or otherwise as suited their sovereign interests, conveniences, circumstances, or commitments.

The Council has said, however, that neither this phrase, "capacity to pay", nor the principle it formulates has any proper place whatsoever in a discussion between a sovereign and his private foreign creditors. A sover-

eign must be assumed to know when he borrows from private parties whether or not he will be able to pay, whether or not he is incurring an obligation within his "capacity to pay." The foreign creditor is not able to determine this matter for himself, either at the time of the borrowing or thereafter. Furthermore, whether a sovereign pays, or does not pay, depends in greatest part upon his will to pay. For few, if any, governments have borrowed beyond their *capacity* to pay if they really had a will to make the necessary levy upon the property of their nationals, and to pay. No nation has any right to invoke its lack of "capacity to pay" its obligations to private creditors until it has fully exhausted its taxing powers, and no debtor sovereign now in default, in so far as the Council is advised, has even approached a condition of exhaustion of its taxing powers.

The Council has announced its intention to continue to take advantage of every opportunity that may arise to aid the holders of defaulted foreign dollar bonds.

J. REUBEN CLARK, JR.

NEUTRALITY OF ÉIRE

(Following a course which Mr. de Valera had indicated as early as the preceding February, Éire elected to be neutral when Great Britain and the Dominions of the British Commonwealth entered the present war against Germany.) While it would be premature to deal with the way in which Irish neutrality has worked out in actual practice until more documentary evidences are available, some matters relating to the status itself present engaging questions of public law, both constitutional and international.

(Sometimes called an "honorary" member of the British Commonwealth of Nations,¹ Éire has evolved as the most definitely independent entity of this group. The Constitution effective in 1937, which omitted specific mention of the King, left open the way to provision by Irish statute for the appointment of diplomatic and consular agents and the conclusion of international agreements through "any organ used as a constitutional organ for the like purposes" by other members of the British Commonwealth. The Executive Authority (External Relations) Act, 1936, had set forth that the Executive Council in Ireland should appoint diplomatic agents, but that so long as the country was associated with the other entities in the British Commonwealth, the King might and was authorized to act on behalf of Ireland for this purpose, as and when advised by the Executive Council to do so.² The King thus became, in contemplation of the Irish leadership, a "statutory officer."³ The power to bring Éire into a war was kept in Ireland, assent of Dáil Eireann being required for a declaration or for participation.

¹ The Times (London), Oct. 7, 1939, p. 3.

² See A. B. Keith, "The Constitution of Éire," *Juridical Review*, Vol. 49, pp. 256-281 (Sept., 1937); A. W. Bromage, "Constitutional Developments in Saorstát Eireann and the Constitution of Éire: I, External Affairs," *American Political Science Review*, Vol. 31, pp. 842-861 (Oct., 1937).

³ The Round Table, No. 115, p. 590 (June, 1939).

But with her currency geared to the pound sterling, her principal markets in England, and her economic life inevitably affected by policies adopted across the Irish Sea, the country is not exactly separated from Great Britain in an economic sense. At the same time, the old grievance concerning partition afforded a political reason for the state's remaining aloof from Great Britain in the war, and for Irish political leaders' avoidance of too much expression of sympathy for the British cause. A policy of participation in the struggle would apparently have provoked strong dissent. The coming of the war seems to have put an end to I.R.A. activities in Great Britain, but it has brought no all-Ireland union. Soon after the beginning of the war the Governor of Northern Ireland (an area where there is a British "garrison" but to which the British Military Service Bill was not applied) expressed to the King the "undying loyalty and devotion of this portion of Your Majesty's Empire."⁴ Northern Ireland is in a state of war notwithstanding the fact that, by the Constitution of Éire, the national territory of the latter state "consists of the whole island of Ireland, its islands and the territorial seas."⁵ A practical evidence of the political separation of Éire from Great Britain is the British control of prices of products imported from Southern Ireland to England.

Questions of international law growing out of the war relate particularly to nationality, representation, and certain problems of a neutral incident to geographical propinquity. Measures taken in Éire with respect to resident aliens presumably apply to British subjects, including those from Northern Ireland, as well as to Germans. (By existing law of Ireland, citizens of Éire do not have the character of British subjects while in Ireland, whatever British law may say as to their remaining British subjects at least while they are outside of Éire.⁶ Mr. de Valera's view has been that the British attitude on conscription of Irish in England was at variance with international usage and the Hague Conventions.⁷ Early in the war, numbers of Germans were reported to be leaving Éire in anticipation of the country's neutrality being short-lived.⁸ The fact of Irish volunteers in the British forces would not involve the legal neutrality of Éire if there were no enlisting or recruiting in the neutral territory. Within a few days after the beginning of hostilities, the Dáil passed the Emergency Powers Act, 1939, whereby the government was given wide powers to control the movement of aliens in Ireland.⁹)

⁴ The Times (London), Sept. 5, 1939, p. 10.

See "The British Commonwealth Goes to War," by Robt. B. Stewart, in the American Foreign Service Journal (December, 1939), Vol. 16, p. 645.

⁵ Art. II. The article following avoided an anomalous situation by providing in effect that the laws enacted by the Irish parliament should have the same area, extent of application, and the same extraterritorial effect, as those of the former Irish Free State.

⁶ A. B. Keith, *loc. cit.* ⁷ The Round Table, No. 116, p. 802 (Sept., 1939).

⁸ The Times (London), Sept. 13, 1939, p. 4.

⁹ The Act is summarized in Irish Jurist, Vol. 5, pt. 4, pp. 54-56 (Oct.-Dec., 1939).

Before the close of the first month of the war, the British Government had designated, in a "war emergency measure,"¹⁰ a special representative to Dublin. The appointee, Sir John Maffey, will presumably function not merely as another trade representative, nor as a minister plenipotentiary comparable with the German Minister in Dublin. According to the statement by the Secretary of State for Dominion Affairs, the Governments of the United Kingdom and of Éire took the action in order that "the existing system of communication" between the two countries might be supplemented.¹¹

(A press censorship, increased taxes, a petrol rationing system, reduced shipping service between Ireland and England, and black-outs in Dublin seem to bear out Mr. de Valera's statement that Éire cannot hope to escape many of the consequences of the war.) The Chief Minister admitted in an address before Dáil Éireann that because persons were not neutral in their individual opinions, the government's task of maintaining official neutrality would not be particularly easy.¹²) Late in November (the Irish Government announced the creation of a small naval force, to consist of motor torpedo boats and armed trawlers, which will supplement Ireland's coastal observation and fishery patrol vessels.) The step followed "intensified naval warfare and sinkings along the Irish coasts."¹³ Irish complaint at the country's being included in combat zones in which American vessels are now forbidden to operate, drew from the Undersecretary of State of the United States the assurance that friendliest consideration would be given.¹⁴

To most of the special measures which the Irish Government has taken, belligerents could have no objection on grounds of right. (As to black-outs) which were partial before November 18 but were to be complete thereafter, (question was raised in Ireland as to whether their institution involved a breach of neutrality.) Because of propinquity, and the possibility of locating British centers by calculation of the distance from such a point as Dublin, the policy has seemed justified by considerations of the strictest neutrality. Objection to black-outs has stressed their depressing psychological effect and has pointed to the contrasting policy of such a country as Denmark, with its flood-lighting of frontiers.¹⁵ That any neutral state may follow either of these courses without breach of its neutrality, seems clear. It would appear that a novel duty would be placed upon a neutral if it were required to conceal its very location from belligerent aircraft during the night.)

ROBERT R. WILSON

¹⁰ Manchester Guardian Weekly, Sept. 29, 1939, p. 241.

¹¹ The Times (London), Sept. 28, 1939, p. 3.

¹² *Ibid.*, Oct. 2, 1939, p. 5.

¹³ New York Times, Nov. 28, 1939, p. 2.

¹⁴ The Times (London), Nov. 15, 1939, p. 7.

¹⁵ *Ibid.*, Nov. 7, 1939, p. 15.

CURRENT NOTE

ANNUAL MEETING OF THE SOCIETY

The Committee on Annual Meeting of the Society for the year 1940, after obtaining by mail the views of the members of the Executive Council, has decided to hold the Annual Meeting in conjunction with the Eighth American Scientific Congress, to be held in Washington May 10-18, 1940. The members of the Committee and of the Executive Council were unanimous in approving the change of the date of the Society's meeting from the last week in April until the period in May just mentioned.

The Eighth American Scientific Congress will be held in Washington upon the invitation of the Government, acting under authority of a resolution of Congress. It is expected that delegates from all the American Republics representative of science will be in attendance. As was the case with previous Scientific Congresses in this series, the program has been divided into a number of Sections corresponding to various branches of science. Section X will be devoted to the consideration of International Law, Public Law and Jurisprudence, and it is in connection with the meeting of this Section of the Congress that the American Society of International Law will correlate its Annual Meeting.

The Society will hold its opening session on Monday evening, May 13, at which it is expected that Mr. Cordell Hull, Secretary of State, the new President of the Society, will preside. Meetings will be held in the mornings and afternoons of Tuesday, Wednesday and Thursday, May 14, 15 and 16. Some of these meetings will be joint meetings with the Section on International Law of the Congress and others will be separate meetings of the Society. A definite program will be sent to each member of the Society as soon as the details are worked out in coöperation with the officials of the Congress. The official banquet of the Congress will be held on Thursday evening, May 16, which will be open to attendance by members of the Society. The official banquet will accordingly take the place of the usual annual banquet of the Society; but a luncheon will be held by the Society, probably on Wednesday, May 15.

There will be some sightseeing trips around Washington and social entertainments in connection with the meetings of the Congress in which it is understood members of the Society will have the privilege of participating.

In addition to the Society, other organizations interested in the subjects of this Section will meet in Washington during the same period, such as the Section of International and Comparative Law of the American Bar Association and the American Law Institute.

It is suggested that members of the Society make a note of the dates of the Annual Meeting and plan in advance to attend it. It will provide an unusual

opportunity to meet not only outstanding citizens of this country interested in international law and jurisprudence, but like-minded delegates from all the countries of the Americas. It is likewise suggested that those members who are engaged in academic work make arrangements in advance with their college and university authorities which will enable them to come to Washington during the period of the Annual Meeting.

GEORGE A. FINCH
Secretary

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 16–NOVEMBER 15, 1939

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *R. A. I.*, Revue aéronautique internationale; *U. S. T. S.*, U. S. Treaty Series.

May, 1939

- 11 GREAT BRITAIN—ROMANIA. Protocol signed at Bucharest regarding commercial and economic relations with Rumania. Text: *G. B. T. S.* No. 25 (1939), *Cmd.* 6018.

June, 1939

- 17 PERMANENT COURT OF INTERNATIONAL JUSTICE. The Principality of Liechtenstein submitted an application instituting proceedings against the Royal Hungarian Government (The Gerliczy Case). *L. N. M. S.*, July, 1939, p. 308.

August, 1939

- 15–19 INTER-PARLIAMENTARY UNION. Meetings of the 35th session held at Oslo. Resolution adopted unanimously that Europe should try to settle its disputes "in a spirit of justice and good-will." *N. Y. Times*, Aug. 20, 1939, p. 14; *London Times*, Aug. 21, 1939, p. 9. Delegates voted for establishment of a Jewish refugee haven in Africa. *C. S. Monitor*, Aug. 21, 1939, p. 4. Texts of resolutions adopted: *Inter-parliamentary Bulletin*, July/Sept. 1939, pp. 109–112.
- 16 MEXICO—UNITED STATES. Extradition treaty signed at Mexico City, supplementing the treaties of 1899, 1902, 1925. *N. Y. Times*, Aug. 17, 1939, p. 12; *D. S. B.*, Aug. 19, 1939, p. 147.
- 17 PALESTINE. League of Nations Mandates Commission's report on the British plan for Palestine showed four of the seven members opposed. *C. S. Monitor*, Aug. 17, 1939, p. 4. Text of report: *N. Y. Times*, Aug. 18, 1939, p. 7. Main observations and British Government's reply: *London Times*, Aug. 18, 1939, p. 9.
- 19 TIENTSIN BLOCKADE. Negotiations were suspended by Great Britain and Japan by British refusal to accept Japanese economic proposals without further consultation with the United States and other interested Powers. *N. Y. Times*, Aug. 20, 1939, p. 1.
- 20 GERMANY—SOVIET RUSSIA. Seven-year trade and credit agreement signed. *N. Y. Times*, Aug. 21, 1939, pp. 1, 4.
- 21 LIBERIA—UNITED STATES. Conciliation treaty signed at Monrovia. *D. S. B.*, Sept. 23, 1939, p. 291.
- 23 GREAT BRITAIN—TURKEY. Notes exchanged at Angora for amendment of agreement of Sept. 2, 1936, regarding trade and clearing. Text: *G. B. T. S.* No. 48 (1939), *Cmd.* 6118.

- 23 TIENSIN BLOCKADE. Writ of *habeas corpus* on behalf of four Chinese suspected of terrorism dismissed on ground that a *prima facie* case had been established. *B. I. N.*, Sept. 9, 1939, p. 967. Text of judgment: *London Times*, Aug. 24, 1939, p. 3.
- 23-30 EUROPEAN WAR. At a meeting Aug. 23 of the countries associated in the Oslo Trade Convention, held in Brussels, King Leopold made an appeal for peace. Text: *N. Y. Times*, Aug. 24, 1939, p. 5. Text of joint statement issued by the conference: *London Times*, Aug. 24, 1939, pp. 9, 10. Texts of President Roosevelt's peace appeals of Aug. 24 to Poland and Germany: *D. S. B.*, Aug. 26, 1939, pp. 167-158; *N. Y. Times*, Aug. 25, 1939, pp. 1, 7. Text of Pope Pius XII's peace plea: pp. 1, 9. Texts of (1) President Roosevelt's communication of Aug. 23 to the King of Italy, (2) second appeal of Aug. 25 to Hitler: *D. S. B.*, Aug. 26, 1939, pp. 158-159, 160-161. Texts of Hitler's letter of Aug. 27 to Premier Daladier, demanding the Polish Corridor, and Daladier's reply: *N. Y. Times*, Aug. 27 and 28, 1939, pp. 1, 3, 5.
- 25 GERMANY—JAPAN. Japan protested against the signature of the German-Russian non-aggression treaty. *C. S. Monitor*, Aug. 26, 1939, p. 2; *N. Y. Times*, Aug. 26, 1939, p. 1.
- 25 GREAT BRITAIN—POLAND. Mutual assistance agreement signed in London. Text: *N. Y. Times*, Aug. 26, 1939, p. 4; *London Times*, Aug. 26, 1939, p. 9; *D. S. B.*, Sept. 16, 1939, pp. 270-271.
- 25 PANAMA—UNITED STATES. Agreement regarding neutrality effected by exchange of notes. Text: *Ex. Agr. Ser.* No. 160.
- 26/29 NEUTRALITY. Germany gave assurances on Aug. 26 to Belgium, The Netherlands and Switzerland of its intention to respect their borders; and to Denmark and Lithuania on Aug. 29. *London Times*, Aug. 28, 1939, p. 9; *N. Y. Times*, Aug. 27, 1939, p. 32; *C. S. Monitor*, Aug. 30, 1939, p. 7.
- 30 SCANDINAVIAN NEUTRALITY. Foreign Ministers of Norway, Denmark, Sweden and Finland met at Oslo to discuss their common neutrality. *N. Y. Times*, Aug. 31, 1939, p. 2; *London Times*, Sept. 1, 1939, p. 9.

September, 1939

- 1-5 NEUTRALITY DECLARATIONS. The following countries issued neutrality declarations: Denmark, Latvia, Finland, Yugoslavia, Rumania, Bulgaria and Cuba, Sept. 1. *N. Y. Times*, Sept. 2, 1939, pp. 2, 6. Netherlands, Sept. 3. *N. Y. Times*, Sept. 4, 1939, p. 15. Brazil, Chile, Guatemala, Mexico, Sept. 4. *N. Y. Times*, Sept. 5, 1939, p. 15. Iran, Sept. 5. *B. I. N.*, Sept. 23, 1939, p. 1015. United States and Spain, Sept. 5. *N. Y. Times*, Sept. 6, 1939, p. 1; *B. I. N.*, Sept. 23, 1939, p. 1023.
- 1-8 EUROPEAN WAR. Text of President Roosevelt's plea against bombing of civilian populations and replies: *D. S. B.*, Sept. 2, 1939, pp. 181-183. Danzig was accepted into the Reich by acclamation of the Reichstag on Sept. 1. *London Times*, Sept. 2, 1939, p. 9. Poland invoked Sept. 1 the British-Polish mutual assistance pact of Aug. 25, 1939. Great Britain and France sent a warning Sept. 1 to Germany demanding a cessation of military action in Poland. *N. Y. Times*, Sept. 2, 1939, p. 1. Great Britain and France declared war Sept. 3. *N. Y. Times*, Sept. 4, 1939, p. 1. Text of Hitler's reply to ultimatum, and proclamation to the troops: p. 2. South Africa severed diplomatic relations with Germany Sept. 5. *N. Y. Times*, Sept. 6, 1939, p. 1. Japan issued a statement Sept. 5 on non-intervention. *London Times*, Sept. 6, 1939, p. 5. Great Britain proclaimed a virtual blockade of Germany Sept. 8. *N. Y. Times*, Sept. 9, 1939, p. 1.

- 3 GERMAN STANDSTILL AGREEMENT. Creditors of Germany terminated the agreement of 1932 [prolonged at various times]. On Sept. 6 announcement was made that five New York banks had obtained warrants of attachment in the New York Supreme Court against local assets of 16 German banking institutions in an endeavor to collect amounts which became due upon cancellation of the agreement. *N. Y. Times*, Sept. 7, 13, 1939, pp. 1, 37.
- 3-8 WAR DECLARATIONS. Text of British declaration as of Sept. 3; notices by Canada and Australia, France, Sept. 3; New Zealand, Sept. 5; South Africa, Sept. 6; Czechoslovakia (by President Beneš), Sept. 8. *London Times*, Sept. 4, 1939, pp. 5, 8; Sept. 7, p. 6; *N. Y. Times*, Sept. 4, 7, 9, 1939, pp. 6, 7, 3; *B. I. N.*, Sept. 23, 1939, p. 1019. Transjordan affirmed its support on Sept. 7. *B. I. N.*, Sept. 23, 1939, p. 1024.
- 4 FRANCE—POLAND. Protocol signed at Paris establishing conditions of alliance virtually identical with those established between Great Britain and Poland on Aug. 28, 1939. *C. S. Monitor*, Sept. 6, 1939, p. 1; *N. Y. Times*, Sept. 6, 1939, p. 18; Text: *D. S. B.*, Sept. 30, 1939, pp. 312-313.
- 4-9 CONTRABAND OF WAR. Text of British proclamation: *London Times*, Sept. 5, 1939, p. 3; *N. Y. Times*, Sept. 9, 1939, p. 2; *D. S. B.*, Sept. 16, 1939, pp. 250-251. Text of German law: *N. Y. Times*, Sept. 14, 1939, p. 9; *D. S. B.*, Sept. 23, 1939, p. 285. Texts of both: *Cong. Rec.* (daily), Oct. 5, 1939, pp. 278-279. Text of French list of Sept. 4: *D. S. B.*, Nov. 18, 1939, p. 555. Australia proclaimed as contraband, on Sept. 9, all supplies usable by the enemy. *B. I. N.*, Sept. 23, 1939, p. 994. Text of New Zealand's regulations: *D. S. B.*, Nov. 18, 1939, p. 556.
- 5 EMBARGO. Text of President Roosevelt's proclamation regarding export of arms, ammunition and implements of war: *C. S. Monitor*, Sept. 6, 1939, p. 8; *N. Y. Times*, Sept. 6, 1939, p. 3; *D. S. B.*, Sept. 9, 1939, pp. 208-211.
- 5/6 PANAMA CANAL. Texts of executive order regulating use of Canal by ships of belligerent countries, and presidential proclamation concerning neutrality in the Canal Zone: *N. Y. Times*, Sept. 6, 7, 1939, pp. 14, 15; *D. S. B.*, Sept. 9, 1939, pp. 213-216; this JOURNAL, Supplement, pp. 28, 31. Regulations concerning navigation of foreign aircraft in Canal Zone: *D. S. B.*, Oct. 14, 1939, pp. 379-380; *N. Y. Times*, Oct. 11, 1939, p. 13; this JOURNAL, Supplement, pp. 32-36.
- 5-14 NEUTRALITY OF THE UNITED STATES. Text of Presidential proclamation: *N. Y. Times*, Sept. 6, 1939, p. 2. Text, with additional proclamations regarding arms and ammunition exports: *D. S. B.*, Sept. 9, 1939, pp. 203-211. Text of Secretary of State's statement of Sept. 14; *N. Y. Times*, Sept. 15, 1939, p. 14; *D. S. B.*, Sept. 16, 1939, p. 245.
- 6 CREDITS TO BELLIGERENTS. Text of President Roosevelt's proclamation concerning credits to belligerents: *D. S. B.*, Sept. 9, 1939, p. 221.
- 6 GERMANY—IRAQ. Diplomatic relations severed by Iraq. *N. Y. Times*, Sept. 7, 1939, p. 1; *London Times*, Sept. 8, 1939, p. 7.
- 6-15 NEUTRALITY DECLARATIONS. Uruguay and Peru, Sept. 6. *N. Y. Times*, Sept. 7, 1939, p. 16. Dominican Republic, Sept. 7. *N. Y. Times*, Sept. 8, 1939, p. 15. Nicaragua, Sept. 8. *N. Y. Times*, Sept. 9, 1939, p. 3. Afghanistan, Sept. 8. *B. I. N.*, Sept. 23, 1939, p. 994. Norway, Sept. 8. *London Times*, Sept. 9, 1939, p. 7. Guatemala, Sept. 9. *N. Y. Times*, Sept. 10, 1939, p. 38. Panama, Sept. 11. *N. Y. Times*, Sept. 12, 1939, p. 11. Paraguay, Sept. 15. *N. Y. Times*, Sept. 16, 1939, p. 3. The following announced their neutrality to the League of Nations: Argentina, Sept. 6; Mexico, Sept. 14. *L. N. M. S.*, Aug./Sept. 1939, pp. 318-320.

- 7 NAVAL TREATIES. British Ministry of Information announced that the London Naval Treaty of 1936 and naval treaties of Apr. 27, 1938, and July 6, 1938, with Poland and Russia have been indefinitely suspended. *C. S. Monitor*, Sept. 7, 1939, p. 2; *N. Y. Times*, Sept. 7, 1939, p. 16.
- 12-17 SCANDINAVIAN NEUTRALITY. At a meeting in Brussels on Sept. 12, at which Belgium was represented in addition to Norway, Denmark, Sweden and Finland, committees were named to study judicial and economic problems of staying out of war, and commercial exchange in view of war. *C. S. Monitor*, Sept. 12, 1939, p. 4; *N. Y. Times*, Sept. 13, 1939, p. 5. Communiqué on neutrality issued on Sept. 16. *N. Y. Times*, Sept. 17, 1939, p. 44. The Premiers of Sweden, Norway, Finland and Denmark, with a representative from Iceland, held meeting at Copenhagen on Sept. 18 to discuss neutrality. *N. Y. Times*, Sept. 19, 1939, p. 10; *C. S. Monitor*, Sept. 18, 1939, p. 6. Communiqué issued on Sept. 19, confirming their will to maintain a policy of neutrality and expressing the right to continue commercial relations with all states. *B. I. N.*, Oct. 7, 1939, pp. 1070-1071; *C. S. Monitor*, Sept. 19, 1939, p. 2; *N. Y. Times*, Sept. 20, 1939, p. 8. Text: *London Times*, Sept. 20, 1939, p. 10.
- 14 HUNGARY—RUMANIA. Trade agreement signed in Budapest, providing for reduction of the Hungarian debt by increased exports to Rumania. *B. I. N.*, Sept. 23, 1939, p. 1014.
- 14 POISON GAS. Lord Halifax said in House of Lords that Germany had promised to observe the Geneva Protocol prohibiting use of poisonous gases and bacteriological methods of warfare under reservation that it was not violated by the enemy. *B. I. N.*, Sept. 23, 1939, p. 1012.
- 16-27 EUROPEAN WAR. Soviet Russian troops invaded Poland Sept. 16. *N. Y. Times*, Sept. 17, 1939, p. 1. Warsaw surrendered unconditionally Sept. 27. *N. Y. Times*, Sept. 28, 1939, p. 1. A joint Russian-German communiqué of Sept. 22 announced that the Pissa, Narew, Vistula and San Rivers will form the new frontier between the two countries. *N. Y. Times*, Sept. 23, 1939, p. 4. Text: *London Times*, Sept. 23, 1939, p. 6.
- 17 RUMANIA—SOVIET RUSSIA. Official confirmation by Russia of intent to respect Rumanian neutrality and territory. *N. Y. Times*, Sept. 18, 1939, p. 1.
- 17 SLOVAKIAN RECOGNITION. Recognition by Soviet Russia by acceptance of the first Slovak Minister to Moscow. *N. Y. Times*, Sept. 18, 24, 1939, pp. 2, 7.
- 17/18 BOMBARDMENT OF OPEN TOWNS. Texts of telegrams exchanged by President Moscicki, of Poland, and President Roosevelt. *D. S. B.*, Sept. 23, 1939, p. 282; *N. Y. Times*, Sept. 19, 1939, pp. 1, 12.
- 18 AMOY INTERNATIONAL SETTLEMENT. Japanese authorities announced compromise over the government of the Settlement. *C. S. Monitor*, Sept. 18, 1939, p. 2.
- 19 FRANCE—GREAT BRITAIN. Ratifications exchanged at London of agreement signed Apr. 9, 1935, for reciprocal exemption from income tax of air transport profits. Text: *G. B. T. S.* No. 51 (1939), *Cmd.* 6126.
- 20 GERMANY—GREAT BRITAIN. Final report of Rt. Hon. Sir Neville Henderson on circumstances leading to termination of his mission to Berlin. Text: *Germany* No. 1 (1939), *Cmd.* 6115.
- 20-October 18 NEUTRALITY DECLARATIONS. Thailand (Siam), Sept. 20. *B. I. N.*, Oct. 7, 1939, p. 1095. Ireland (to the League of Nations), Oct. 4. *L. N. M. S.*, Aug./Sept. 1939, p. 319. Bolivia, Oct. 18. *N. Y. Times*, Oct. 19, 1939, p. 4.

- 22 ECUADOR—UNITED STATES. Extradition treaty signed at Quito supplementary to treaty signed June 28, 1872. *D. S. B.*, Sept. 30, 1939, p. 313.
- 23 GREAT BRITAIN—NORWAY. Great Britain promised to respect Norway's neutrality provided other states take the same action. *N. Y. Times*, Sept. 24, 1939, p. 8.
- 23-October 3 FOREIGN MINISTERS CONSULTATIVE MEETING. Sessions held at Panama City. *N. Y. Times*, Sept. 24, 1939, p. 40; *C. S. Monitor*, Oct. 3, 1939, pp. 1, 5. The conference voted to create a permanent committee to study commercial and financial problems. It adopted declarations concerning a 300-mile safety sea zone, continental solidarity for the Americas, and neutrality (Declaration of Panama). Text of Final Act; *D. S. B.*, Oct. 7, 1939, pp. 321-334; this JOURNAL, Supplement, pp. 1-20.
- 24 GERMANY—SOVIET RUSSIA. Ratifications exchanged of non-aggression pact signed Aug. 23, 1939. *N. Y. Times*, Sept. 25, 1939, p. 5. English text: *N. Y. Times*, Aug. 24, 1939, p. 1; *London Times*, Aug. 25, 1939, p. 11; *D. S. B.*, Aug. 26, 1939, p. 172. French text: *L'Esprit International* (Paris), Oct. 1939, p. 659.
- 25 GERMAN WHITE BOOK. Summary of last few days' negotiations prior to start of war. *N. Y. Times*, Sept. 26, 1939, p. 9.
- 28/October 4 ESTONIA—SOVIET RUSSIA. Text of 10-year mutual assistance pact signed at Moscow: *N. Y. Times*, Sept. 29, 1939, p. 8; *London Times*, Sept. 30, 1939, p. 5; *D. S. B.*, Nov. 11, 1939, pp. 543-544; *Current History*, Nov. 1939, p. 55. Ratifications exchanged Oct. 4 at Tallinn. *N. Y. Times*, Oct. 5, 1939, p. 6.
- 28/October 4 GERMANY—SOVIET RUSSIA. Texts of border and friendship treaty, declaration and accompanying documents, signed Sept. 28, 1939; *N. Y. Times*, Sept. 29, 1939, pp. 1, 4; *London Times*, Sept. 30, 1939, p. 5. Additional protocol signed on Oct. 4. *C. S. Monitor*, Oct. 5, 1939, p. 8.
- 30 BELGIUM—FRANCE. Commercial agreement signed concerning coal from Belgium and ores from France. *B. I. N.*, Oct. 7, 1939, p. 1068.
- 30 SUBMARINE WARFARE. German Government issued notice that British armed merchantmen would be sunk without warning or measures taken to assure safety of the crews. *N. Y. Times*, Sept. 30, 1939, p. 1.

October, 1939

- 2-18 POLISH RECOGNITION. The following countries have granted recognition to the government in exile: United States, Oct. 2; Mexico, Oct. 3; Great Britain, Turkey, Sweden, Oct. 4; Argentina, Oct. 5; Brazil, Oct. 14; Uruguay, Oct. 18; France (no date); *N. Y. Times*, Oct. 3, 1939, pp. 1, 7; Oct. 5, pp. 4, 10; Oct. 8, pp. 4, 34; Oct. 15, p. 42; *London Times*, Oct. 5, p. 7; *C. S. Monitor*, Oct. 3, 18, 21, pp. 5, 2, 1.
- 2-19 EUROPEAN WAR. Secretary of State Hull issued statement Oct. 2 that the United States would not recognize the conquest and division of Poland. Text: *D. S. B.*, Oct. 7, 1939, p. 342. Hitler announced Oct. 19 the formal annexation of Pomorze, Pomerellen and Polish Upper Silesia. *N. Y. Times*, Oct. 20, 1939, pp. 1, 8.
- 3 ANTARCTIC REGIONS. President Cerda of Chile appointed Dr. Julio Escudero to study and report to the government on Chilean rights in the Antarctic preparatory to filing claims. *N. Y. Times*, Oct. 4, 1939, p. 7.
- 3 GERMANY. Notes sent to Norway, Sweden, Denmark and the United States, advised their merchant ships not to attempt to evade German naval forces or accept British or French convoy. *B. I. N.*, Oct. 21, 1939, p. 1143; *N. Y. Times*, Oct. 3, 1939, p. 1.

- 5-23 **LATVIA—SOVIET RUSSIA.** A 10-year mutual assistance pact signed at Moscow. Oct. 5, gives Russia new Baltic bases for aviation and artillery. Text: *N. Y. Times*, Oct. 6, 1939, p. 9; *London Times*, Oct. 6, 1939, p. 7; *D. S. B.*, Nov. 11, 1939, pp. 542-543. Latvia ratified the pact on Oct. 10. *London Times*, Oct. 11, 1939, p. 8. On Oct. 23 a military mixed commission signed at Riga an agreement implementing the pact of Oct. 5. *London Times*, Oct. 25, 1939, p. 8.
- 7-12 **FINLAND—SOVIET RUSSIA.** A Finnish communiqué of Oct. 7 stated that the Soviet Government had inquired whether Finland would send a representative to Moscow to negotiate on certain political and economic questions. Dr. Paasikivi, Minister to Sweden, left on the 9th. *B. I. N.*, Oct. 21, 1939, p. 1140; *N. Y. Times*, Oct. 8, 10, 1939, pp. 1, 8. Report of four demands on Finland: *N. Y. Times*, Oct. 13, 1939, p. 6. Negotiations opened at Moscow Oct. 12. *N. Y. Times*, Oct. 13, 1939, p. 1.
- 10 **PERMANENT COURT OF ARBITRATION.** Iran appointed as members of the court Mr. Hossein Ghadimy, Mr. Mohamed Réza Vojdani and Mr. Ali Akbar Dehkhoda. *D. S. B.*, Dec. 2, 1939, p. 643.
- 10/16 **LITHUANIA—SOVIET RUSSIA.** 15-year mutual assistance treaty signed at Moscow. Text: *N. Y. Times*, Oct. 11, 1939, p. 8; *London Times*, Oct. 12, 1939, p. 7. Ratifications exchanged Oct. 16. *London Times*, Oct. 17, 1939, p. 7; *B. I. N.*, Oct. 21, 1939, p. 1154.
- 13 **AMERICAN NEUTRAL ZONE AT SEA.** British Admiralty statement termed such a zone impractical. *N. Y. Times*, Oct. 14, 1939, p. 2. On Oct. 20, Ecuador fixed a 500-mile neutral zone, including the Galápagos Islands. *N. Y. Times*, Oct. 21, 1939, p. 2.
- 16 **ESTONIA—GERMANY.** Agreement signed at Tallinn for repatriation to the Reich of Estonian citizens of the German race. *London Times*, Oct. 17, 1939, p. 7; *B. I. N.*, Oct. 21, 1939, p. 1150.
- 16 **GERMANY—YUGOSLAVIA.** Trade agreement signed at Belgrade. *N. Y. Times*, Oct. 18, 1939, p. 12.
- 17 **KULANGSU ISLAND.** Final agreement signed between Japan and the Kulangsu Municipal Council settling the dispute dating from May 10. It provides for Council coöperation with Japanese consular officials. *C. S. Monitor*, Oct. 18, 1939, p. 2; *London Times*, Oct. 19, 1939, p. 7; *B. I. N.*, Nov. 4, 1939, p. 1195.
- 17-26 **REFUGEES.** Intergovernmental Committee for Refugees opened meetings on Oct. 17 at Washington. Texts of statement and addresses: *N. Y. Times*, Oct. 18, 1939, p. 16. Text of communiqué issued before adjournment to Oct. 26: *N. Y. Times*, Oct. 19, 1939, p. 25; *C. S. Monitor*, Oct. 18, 1939, p. 1. Proceedings and speeches: *D. S. B.*, Oct. 21, 1939, pp. 397-402. On Oct. 26 the Committee received a proposal from the Dominican Republic to establish a colony for refugees there. *C. S. Monitor*, Oct. 26, 1939, p. 1. The committee agreed that surveys of possible openings be made. *D. S. B.*, Oct. 28, 1939, p. 434. Text of communiqué: *N. Y. Times*, Oct. 27, 1939, p. 5. Text of Sir Herbert Emerson's report on refugees since 1933: *N. Y. Times*, Oct. 29, 1939, p. 26.
- 17-November 4 **INDIA.** The Viceroy issued a statement Oct. 17 on the Allies' war objectives, the contemplated constitutional sphere for India, and the best methods of closer association of Indian public opinion with the prosecution of the war. *B. I. N.*, Nov. 4, 1939, p. 1207; *Cmd.* 6115. Texts of letters from Indian leaders and summary of Viceroy's statement (Nov. 2-4) regarding promises of Dominion status before assistance would be granted to the British Empire: *London Times*, Nov. 6, 1939, p. 8.

- 18-19 SCANDINAVIAN STATES CONFERENCE. On invitation of King Gustav of Sweden, the Kings of Denmark and Norway, and President Kallio of Finland opened meetings Oct. 18 at Stockholm to consider their status in the European War, to which President Roosevelt sent a message of good wishes. *N. Y. Times*, Oct. 19, 1939, p. 1; text of message: p. 8; *D. S. B.*, Oct. 21, 1939, p. 403. President Kallio replied Oct. 18. Text: *C. S. Monitor*, Oct. 18, 1939, p. 8. Joint communiqué issued after the two-day meetings. Text: *N. Y. Times*, Oct. 20, 1939, p. 6; *C. S. Monitor*, Oct. 20, 1939, p. 5; *London Times*, Oct. 20, 1939, p. 8.
- 18/November 4 SUBMARINES. President Roosevelt issued proclamations barring submarines of belligerent nations from United States ports and territorial waters. Texts: *N. Y. Times*, Oct. 19, Nov. 5, 1939, pp. 2, 44; *D. S. B.*, Oct. 21, Nov. 4, 1939, pp. 396-397; 456-457; this JOURNAL, Supplement, pp. 56-58.
- 19-30 POLAND. Secretary of State Hull replied Oct. 20 to the Polish note of Oct. 19, protesting acceptance by Lithuania of territory ceded by the Soviet Union. Texts of notes: *D. S. B.*, Oct. 21, 1939, p. 403; *N. Y. Times*, Oct. 21, 1939, p. 3. Texts of Polish note of Oct. 27 and Secretary Hull's reply of the 30th concerning annexation of former Polish areas. *D. S. B.*, Nov. 4, 1939, pp. 458-459; *N. Y. Times*, Oct. 31, 1939, p. 3.
- ✓19-November 16 ANGLO-FRENCH-TURKISH PACT. The 15-year mutual assistance pact signed at Ankara on Oct. 19, was ratified by France on Oct. 27, and by Turkey, Nov. 8. *London Times*, Nov. 9, 1939, p. 8; *C. S. Monitor*, Oct. 27, 1939, p. 6. Text of pact: *N. Y. Times*, Oct. 20, 1939, p. 5; *London Times*, Oct. 20, 1939, p. 7; *D. S. B.*, Nov. 11, 1939, pp. 544-546; *Turkey No. 2* (1939), Cmd. 6123. Ratifications were exchanged at Ankara on Nov. 16. *D. S. B.*, Nov. 25, 1939, p. 604.
- 21 GERMANY—ITALY. Treaty signed at Rome whereby 10,000 Germans in the South Tyrol must move to the Reich, and Italian citizens of the Austrian race may choose to remain or move to Germany. *N. Y. Times*, Oct. 22, 1939, p. 32; *C. S. Monitor*, Oct. 23, 1939, p. 5; *B. I. N.*, Nov. 4, 1939, pp. 1209-1210.
- 24 GERMANY—SOVIET RUSSIA. Trade agreement signed at Moscow providing that 1,000,000 tons of food will be supplied to Germany. *N. Y. Times*, Oct. 25, 1939, p. 3.
- 24 ITALY—YUGOSLAVIA. Commercial agreement signed at Belgrade. *N. Y. Times*, Oct. 25, 1939, p. 11.
- 26 GREAT BRITAIN—SOVIET RUSSIA. The Soviet Government refused to recognize the validity of the British contraband regulations and gave notice of intent to reserve the right to claim compensation for any losses incurred in the enforcement of them. Text of note: *N. Y. Times*, Oct. 26, 1939, p. 7; *London Times*, Oct. 27, 1939, p. 7.
- 26 HUNGARY—SOVIET RUSSIA. Diplomatic relations, interrupted Feb. 2, 1939, were resumed on the appointment of a minister to Hungary by Soviet Russia. *C. S. Monitor*, Oct. 26, 1939, p. 2; *N. Y. Times*, Oct. 27, 1939, p. 11.
- 27 GREAT BRITAIN—ITALY. Accord signed at Rome providing for a permanent commission to regulate trade between the two countries. *N. Y. Times*, Oct. 28, 1939, p. 4. Excerpt from Art. 2: *N. Y. Times*, Nov. 11, 1939, p. 4.
- 27 POPE PIUS XII. Text of first encyclical condemning dictators, treaty-breaking and racism: *N. Y. Times*, Oct. 28, 1939, pp. 8-9.
- 27-28 POLAND—UNITED STATES. Texts of notes regarding annexation by the German Reich of a portion of the territory of the Polish Republic: *D. S. B.*, Nov. 4, 1939, pp. 458-459.

- 28-November 14 FINLAND—SOVIET RUSSIA. The Finnish Inner Cabinet drafted its last offer to Moscow on Oct. 28. *N. Y. Times*, Oct. 29, 1939, p. 38. On Nov. 1 the Finnish Government issued a communiqué stating that publication of Russia's demands [in Foreign Commissar Molotoff's speech of Oct. 31] had created a new situation. Text: *N. Y. Times*, Nov. 1, 1939, pp. 1, 9. On Nov. 12 the Finnish Foreign Minister announced that unless the deadlock in discussions could be broken the delegation would return to Helsinki, which it did on Nov. 14. *N. Y. Times*, Nov. 13, 15, 1939, p. 1.
- 30 GERMANY—LATVIA. Agreement signed at Riga providing that Latvian citizens of German blood shall have the option to choose Reich citizenship and leave before Dec. 15, or abjure German citizenship and remain. *B. I. N.*, Nov. 4, 1939, p. 1213.
- 30-31 GERMAN-AMERICAN MIXED CLAIMS COMMISSION. The umpire, Mr. Justice Owen J. Roberts, awarded damages of \$50,000,000 to 153 claimants as a result of the Black Tom and Kingsland explosions of 1916 and 1917. *N. Y. Times*, Oct. 31, 1939, pp. 1, 12. On Oct. 31 the Zimmermann and Forshay Assets Realization Corporation moved in the United States District Court in New York to enjoin the Secretaries of State and the Treasury from taking steps to pay the award. *C. S. Monitor*, Oct. 31, 1939, p. 2; *N. Y. Times*, Nov. 1, 1939, p. 4.

November, 1939

- 2 GERMANY—UNITED STATES. United States gave notice of its agreement to German proposal of July 22, 1939, that the operation of the extradition treaty, signed July 12, 1930, shall extend also to the territory in which the former extradition treaty between the United States and Austria was effective. Text of German proposal: *D. S. B.*, Nov. 11, 1939, pp. 546-547.
- 2 GREECE—ITALY. Official announcement at Rome of exchange of formal letters regarding friendly relations between the governments. *N. Y. Times*, Nov. 3, 1939, p. 6. Text of Greek statement: *London Times*, Nov. 3, 1939, p. 7.
- 3 GERMANY—SOVIET RUSSIA. Agreement reached for repatriation of Germans in the Ukraine and White Russia, and to send Ukrainians, White Russians, Ruthenians and other Russian nationals in former Polish territory now under German rule, to the Soviet Union. *N. Y. Times*, Nov. 4, 1939, p. 2; *B. I. N.*, Nov. 18, 1939, p. 271.
- 3 SOVIET RUSSIA. The Presidium of the Supreme Soviet passed two laws incorporating Western Ukraine and Western White Russia into its jurisdiction. Text of law pertaining to the Ukraine: *N. Y. Times*, Nov. 4, 1939, p. 5.
- 3/4 NEUTRALITY ACT OF 1939. H. J. Res. 306 adopted by the House and Senate on the 3d and approved by the President on the 4th. *Cong. Rec.*, Nov. 3, 1939, pp. 2124, 2157. Text: *N. Y. Times*, Nov. 4, 1939, p. 6; *International Conciliation*, Dec. 1939; Public No. 54 (76th Cong.), this JOURNAL, Supplement, pp. 44-55.
- 4 BULGARIA—ITALY. Trade agreement signed at Sofia. *N. Y. Times*, Nov. 3, 1939, p. 33; *B. I. N.*, Nov. 18, 1939, p. 1265.
- 4 COMBAT AREAS. Text of Presidential proclamation defining area where United States citizens and ships may not travel: *D. S. B.*, Nov. 4, 1939, pp. 454-455; this JOURNAL, Supplement, pp. 58-59. Text of Department of State's regulations: *D. S. B.*, Nov. 11, 1939, pp. 479-480; this JOURNAL, Supplement, p. 61.
- 4 HUNGARY—SLOVAKIA. Trade agreement signed at Budapest. *London Times*, Nov. 6, 1939, p. 5.

- 4 WAR PROCLAMATION. President Roosevelt, in compliance with the Neutrality Act of Nov. 4, issued a proclamation declaring the existence of a state of war between the countries involved. This proclamation revoked other proclamations of Sept. 5, 8, 10, 1939. Text: *N. Y. Times*, Nov. 5, 1939, p. 44; *D. S. B.*, Nov. 4, 1939, pp. 453-454; this JOURNAL, Supplement, p. 55.
- 6 UNITED STATES—VENEZUELA. Reciprocal trade agreement signed at Caracas. Analysis of general provisions: *D. S. B.*, Nov. 11, 1939, pp. 524-540.
- 7 SUBMARINES. A decree of Panama barred submarines of countries at war from its ports, havens or anchorages. *N. Y. Times*, Nov. 8, 1939, p. 2.
- 7-15 EUROPEAN WAR—PEACE APPEALS. Text of telegrams, dated Nov. 7, sent by Queen Wilhelmina of The Netherlands and King Leopold of the Belgians to France, Great Britain and Germany, offering their good offices: *N. Y. Times*, Nov. 8, 1939, p. 4; *London Times*, Nov. 8, 1939, p. 8. Text of telegrams, sent by King Carol of Rumania supporting the offer: *N. Y. Times*, Nov. 10, 1939, p. 10. Text of replies of Nov. 12 from King George and President Lebrun: *N. Y. Times*, Nov. 13, 1939, p. 2; *London Times*, Nov. 13, 1939, p. 6. On Nov. 15 the Dutch Government announced that Foreign Minister von Ribbentrop had given notice that no formal reply would be made by Germany. *N. Y. Times*, Nov. 16, 1939, p. 10.
- 8 BULGARIA—GREAT BRITAIN. Notes exchanged at London embodying a trade and payments agreement. *London Times*, Nov. 9, 1939, p. 7.
- 8 WAR DECLARATION. Bermuda declared war. *N. Y. Times*, Nov. 9, 1939, p. 8.
- 10 JAPAN—UNITED STATES. Text of statement from the Japanese Embassy in Washington reporting amends made to Americans in China, money paid to missions and permission given for students' return to Shanghai University, etc.: *N. Y. Times*, Nov. 11, 1939, p. 4.
- 14 SWEDEN—UNITED STATES. Ratifications exchanged at Stockholm of convention for avoidance of double income taxation. It will come into force Jan. 1, 1940. *D. S. B.*, Sept. 30, 1939, p. 315, Dec. 2, 1939, p. 643.
- 15 INTER-AMERICAN FINANCIAL AND ECONOMIC COMMITTEE. First meeting took place in Washington of committee established in accordance with a resolution adopted at meeting of Foreign Ministers, held at Panama in September. *N. Y. Times*, Nov. 16, 1939, p. 12.
- 15 PERMANENT COURT OF INTERNATIONAL JUSTICE. Announcement made that members will continue in office during 1940 without the necessity of election. *N. Y. Times*, Nov. 16, 1939, p. 14.

INTERNATIONAL CONVENTIONS

AIR TRAFFIC. London, Mar. 1, 1939.

Adhesion: Denmark. July 17, 1939.

Reservation withdrawn: Poland, with respect to Danzig. May 30, 1939.

Signatures: Greece, Hungary, Italy, South Africa, Switzerland. *D. S. B.*, Sept. 23, 1939, pp. 292-293.

ASYLUM. Montevideo, Aug. 4, 1939.

Signatures: Argentina, Bolivia, Chile, Paraguay, Peru, Uruguay. *D. S. B.*, Aug. 19, 1939, p. 144; *C. S. Monitor*, Aug. 5, 1939, p. 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES. Stamp Laws. Geneva, June 7, 1930.

Application to: Jamaica, Turks and Caicos Islands, Cayman Islands, Somaliland Protectorate (by Great Britain). *D. S. B.*, Sept. 9, 1939, p. 241.

BILLS OF LADING. Brussels, Aug. 25, 1924.

Ratification deposited: Germany (with reservations) (effective Jan. 5, 1940). *D. S. B.*, Nov. 18, 1939, p. 575.

CATTLE HERDBOOKS. Rome, Oct. 14, 1936.

Ratification deposited: Latvia. Sept. 26, 1939. *D. S. B.*, Oct. 28, 1939, p. 450.

CENTRAL AMERICAN REGIONAL RADIO CONVENTION. Guatemala, Dec. 8, 1938.

Ratification deposited: Canal Zone (by United States). Sept. 8, 1939. *D. S. B.*, Sept. 16, 1939, p. 272.

CHECKS. Stamp Laws. Geneva, Mar. 19, 1931.

Application to: Jamaica (including the Turks and Caicos Islands and Cayman Islands) and Somaliland Protectorate (by Great Britain). *D. S. B.*, Sept. 9, 1939, p. 240.

COLLISIONS IN INLAND NAVIGATION. Geneva, Dec. 9, 1930.

Ratification: France. July 12, 1939. *L. N. O. J.*, July/Aug. 1939, p. 338.

COUNTERFEITING CURRENCY. Protocol. Geneva, Apr. 20, 1929.

Ratification: Rumania. June 14, 1939. *L. N. O. J.*, July/Aug. 1939, p. 338.

EDUCATIONAL FILMS. Geneva, Oct. 11, 1933.

Adhesion: Brazil. June 8, 1939. *L. N. O. J.*, July/Aug. 1939, p. 338.

EMPLOYMENT FINDING FOR SEAMEN. Genoa, July 10, 1920.

Ratification deposited: Mexico. Sept. 1, 1939. *D. S. B.*, Oct. 21, 1939, p. 425.

GENERAL ACT FOR PACIFIC SETTLEMENT. Geneva, Sept. 26, 1928.

Suspension:

Australia (with reservation). Sept. 7, 1939. *D. S. B.*, Oct. 7, 1939, p. 352.

France, Great Britain, India, New Zealand, South Africa. *D. S. B.*, Nov. 4, 1939, p. 473.

HOLIDAYS WITH PAY. Geneva, June 24, 1936.

Ratification deposited: France. Aug. 23, 1939. *D. S. B.*, Sept. 30, 1939, p. 315.

HOURS OF WORK (Coal Mines) CONVENTION. Revised. Geneva, June 21, 1935.

Ratification deposited: Mexico. Sept. 1, 1939. *D. S. B.*, Oct. 21, 1939, p. 425.

INDUSTRIAL PROPERTY. London, June 2, 1934.

Adhesions:

Belgium. Nov. 25, 1939.

Switzerland. Nov. 24, 1939. *D. S. B.*, Dec. 2, 1939, p. 644.

INSURANCE, OLD AGE AND INVALIDITY, IN AGRICULTURE, INDUSTRY AND COMMERCE, LIBERAL PROFESSIONS, AND FOR OUTWORKERS AND DOMESTIC SERVANTS. Geneva, June 29, 1933.

Ratifications deposited:

France. Aug. 23, 1939. *D. S. B.*, Sept. 30, 1939, p. 315.

INTELLECTUAL PROPERTY (Copyright). Montevideo, Aug. 4, 1939.

Signatures: Argentina, Bolivia, Paraguay, Peru, Uruguay. *D. S. B.*, Aug. 19, 1939, p. 144.

INTER-AMERICAN CONSULTATION. Final Act. Panama City, Oct. 3, 1939.

Signatures: 21 countries of the Pan American Union.

Text: *D. S. B.*, Oct. 7, 1939, p. 321-334.

JURIDICAL PERSONALITY FOR FOREIGN COMPANIES. Washington, June 25, 1936.

Signature: Dominican Republic. Nov. 7, 1939. *D. S. B.*, Nov. 18, 1939, p. 574.

LEAGUE OF NATIONS. COVENANT. Protocol of Amendment. Geneva, Sept. 30, 1938.

Ratifications deposited:

Bulgaria. *D. S. B.*, Oct. 14, 1939, p. 389.

Netherlands. Oct. 10, 1939. *D. S. B.*, Nov. 11, 1939, p. 546.

Poland. Aug. 7, 1939. *D. S. B.*, Sept. 2, 1939, p. 195.

Signatures:

Australia. June 24, 1939.

Thailand (Siam). May 10, 1939. *L. N. O. J.*, July/Aug. 1939, p. 340; *D. S. B.*, Oct. 28, 1939, p. 448.

LETTERS, ETC., OF DECLARED VALUE. Cairo, Mar. 20, 1934.

Ratification deposited: Bulgaria. Aug. 10, 1939. *D. S. B.*, Oct. 14, 1939, p. 390.

LIBERAL PROFESSIONS. Montevideo, Aug. 4, 1939.

Signatures: Argentina, Bolivia, Chile, Paraguay, Peru, Uruguay. *D. S. B.*, Aug. 19, 1939, p. 144.

LIGHTSHIPS. Lisbon, Oct. 23, 1930.

Application to: Burma (effective Apr. 1, 1937). *D. S. B.*, Sept. 2, 1939, p. 197.

MERCHANDISE MARKS. Madrid, Apr. 14, 1891. Revision. London, June 2, 1934.

Adhesion: Switzerland. Nov. 24, 1939. *D. S. B.*, Dec. 2, 1939, p. 644.

MINIMUM AGE (Sea) CONVENTION. Geneva, Oct. 24, 1936.

Promulgation: United States. Sept. 29, 1939. *D. S. B.*, Sept. 30, 1939, p. 316.

MONEY ORDERS. Cairo, Mar. 20, 1934.

Ratification deposited: Bulgaria. Aug. 10, 1939. *D. S. B.*, Oct. 14, 1939, p. 390.

MOTOR VEHICLES TAXATION. Geneva, Mar. 30, 1931.

Adhesions:

Egypt. May 20, 1939.

Greece. June 6, 1939. *L. N. O. J.*, July/Aug. 1939, p. 338.

NARCOTICS. Geneva, July 13, 1931.

Application to: Burma (effective Apr. 1, 1937). *D. S. B.*, Sept. 30, 1939, p. 314.

NAVAL ARMAMENT TREATY. London, Mar. 26, 1936.

Suspension:

Australia, Canada and New Zealand. Sept. 11, 1939.

France. Sept. 10, 1939. *D. S. B.*, Sept. 23, 1939, p. 291.

Great Britain, Northern Ireland, India. Sept. 3, 6, 1939. *D. S. B.*, Sept. 9, 1939, p. 239.

Italy. Oct. 10, 1939. *D. S. B.*, Oct. 21, 1939, p. 424.

United States. Oct. 2, 1939. *D. S. B.*, Oct. 7, 1939, p. 354.

OFFICERS COMPETENCY CERTIFICATES. Geneva, June 24, 1936.

Promulgation: United States. Sept. 29, 1939. *D. S. B.*, Sept. 30, 1939, p. 316.

Ratification deposited: Mexico. Sept. 1, 1939. *D. S. B.*, Oct. 21, 1939, p. 425.

OPIUM CONVENTION, 2D. Geneva, Feb. 19, 1925.

Application to: Burma (effective Apr. 1, 1937). *D. S. B.*, Sept. 30, 1939, p. 314.

PARCEL POST. Cairo, Mar. 20, 1934.

Ratification deposited: Bulgaria. Aug. 10, 1939. *D. S. B.*, Oct. 14, 1939, p. 390.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.

Suspension:

Australia. Sept. 7, 1939.

France. Sept. 10, 1939.

- Great Britain. Sept. 7, 1939. *D. S. B.*, Oct. 7, 1939, pp. 352-354.
 India. Sept. 27, 1939. *D. S. B.*, Nov. 4, 1939, p. 473.
 New Zealand. Sept. 7, 1939.
 South Africa. Sept. 18, 1939. *D. S. B.*, Oct. 21, 1939, pp. 423-424; *L. N. M. S.*, Aug./Sept. 1939, pp. 321-323.
Renewal of acceptance: Greece. Sept. 8, 1939. *L. N. M. S.*, Aug./Sept. 1939, p. 323.
- PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of Signature. Geneva, Dec. 16, 1920.
Renewal of acceptance (for five years); Greece. Sept. 12, 1939. *D. S. B.*, Oct. 21, 1939, p. 422.
- PHARMACOPOEIAL FORMULAS FOR DRUGS. Revision. Brussels, Aug. 20, 1929.
Adhesion: Great Britain and Northern Ireland (with reservation). Aug. 1, 1939.
Signatures (with reservations by most of the signatories): Belgium, Bulgaria, Denmark, Egypt, France, Greece, Italy, Latvia, Norway, Netherlands, Rumania, Yugoslavia, Sweden, Switzerland.
Text: *G. B. T. S.* No. 47 (1939), *Cmd.* 6117.
- POSTAL SUBSCRIPTIONS TO NEWSPAPERS. Cairo, Mar. 20, 1934.
Ratification deposited: Bulgaria. Aug. 10, 1939. *D. S. B.*, Oct. 14, 1939, p. 390.
- PRISONERS OF WAR. Geneva, July 27, 1929.
Adhesion: Slovak Republic. Sept. 15, 1939. *D. S. B.*, Nov. 4, 1939, p. 474.
- PUBLIC HEALTH OFFICE. Rome, Dec. 9, 1907.
Adhesion: Slovak Republic. June 27, 1939. *D. S. B.*, Sept. 9, 1939, p. 239.
- RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Madrid, Dec. 9, 1932.
Promulgation: United States. Sept. 18, 1939. *D. S. B.*, Sept. 23, 1939, p. 294.
Ratification: Sweden. Oct. 6, 1939. *D. S. B.*, Nov. 25, 1939, p. 605.
Ratification deposited: Rumania. June 14, 1939. *D. S. B.*, Sept. 23, 1939, p. 294.
- RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Revision. Cairo, Apr. 8, 1938.
Ratification: Latvia. Oct. 9, 1939. *D. S. B.*, Nov. 25, 1939, p. 605.
- RED CROSS. Geneva, July 27, 1929.
Adhesion: Slovak Republic. Sept. 15, 1939. *D. S. B.*, Nov. 4, 1939, p. 474.
- REGISTRATION OF INLAND NAVIGATION VESSELS. Geneva, Dec. 9, 1930.
Ratification: France. July 12, 1939. *L. N. O. J.*, July/Aug. 1939, p. 338.
- SAFETY AT SEA. London, May 31, 1929.
Adhesion: Chile (effective Sept. 22, 1939). *D. S. B.*, Sept. 9, 1939, p. 240.
- SANITARY CONVENTION. Paris, June 21, 1926. Modification. Paris, Oct. 31, 1938.
Adhesions:
 Brazil. Sept. 27, 1939. *D. S. B.*, Oct. 21, 1939, p. 424.
 South Africa. Aug. 24, 1939. *D. S. B.*, Sept. 23, 1939, p. 292.
Promulgation: Egypt. Aug. 6, 1939. *D. S. B.*, Oct. 4, 1939, p. 475.
Ratifications:
 Greece. Aug. 9, 1939. *D. S. B.*, Oct. 28, 1939, p. 448.
 Turkey. July 10, 1939. *D. S. B.*, Nov. 11, 1939, p. 547.
Came into force: July 24, 1939. *D. S. B.*, Sept. 23, 1939, p. 292.
- SHIPOWNER'S LIABILITY IN CASE OF SICKNESS, ETC. Geneva, Oct. 24, 1936.
Promulgation: United States. Sept. 29, 1939. *D. S. B.*, Sept. 30, 1939, p. 316.
Ratification deposited: Mexico. Sept. 15, 1939.
Came into force: United States and Belgium. Oct. 29, 1939. *D. S. B.*, Oct. 21, 1939, p. 425.

STATISTICS OF WAGES AND HOURS OF WORK. Geneva, June 20, 1938.

*Ratifications deposited:*Australia. Sept. 5, 1939. *D. S. B.*, Oct. 21, 1939, p. 425.South Africa. Aug. 8, 1939. *D. S. B.*, Sept. 2, 1939, p. 196.

TELECOMMUNICATIONS. Madrid, Dec. 9, 1932.

Ratifications deposited:

Greece. June 3, 1939.

Rumania. June 14, 1939. *D. S. B.*, Sept. 23, 1939, p. 294.

TELEGRAPH REGULATIONS AND PROTOCOL. Cairo, Apr. 8, 1938.

Ratification: Latvia. Oct. 9, 1939. *D. S. B.*, Nov. 25, 1939, p. 605.

TELEGRAPH REGULATIONS AND PROTOCOL. Madrid, Dec. 9, 1932.

Ratification: Sweden. Oct. 6, 1939. *D. S. B.*, Nov. 25, 1939, p. 605-606.*Ratification deposited:* Rumania. June 14, 1939. *D. S. B.*, Sept. 23, 1939, p. 294.

TELEPHONE REGULATIONS. Cairo, Apr. 8, 1938.

Ratification: Latvia. Oct. 9, 1939. *D. S. B.*, Nov. 25, 1939, p. 605.

TELEPHONE REGULATIONS AND PROTOCOL. Madrid, Dec. 10, 1932.

Ratification: Sweden. Oct. 6, 1939. *D. S. B.*, Nov. 25, 1939, p. 605.*Ratification deposited:* Rumania. June 14, 1939. *D. S. B.*, Sept. 23, 1939, p. 294.

TRADE-MARKS REGISTRATION. The Hague, Nov. 6, 1925. Revision. London, June 2, 1934.

Adhesions:

Belgium. Nov. 25, 1939.

Switzerland. Nov. 24, 1939. *D. S. B.*, Dec. 2, 1939, p. 644.

UNIVERSAL POSTAL CONVENTION. Cairo, Mar. 20, 1934.

Adhesion: Germany (including application to Bohemia and Moravia). Nov. 2, 1939.*D. S. B.*, Dec. 2, 1939, p. 644.*Ratification deposited:* Bulgaria. Aug. 10, 1939. *D. S. B.*, Oct. 14, 1939, p. 390.

WORKMEN'S COMPENSATION FOR OCCUPATIONAL DISEASES. Geneva, June 10, 1925.

Denunciation: Netherlands. *D. S. B.*, Oct. 14, 1939, p. 391.

WORKMEN'S COMPENSATION FOR OCCUPATIONAL DISEASES. Geneva, June 10, 1925.

Revised, 1934.

Ratifications:

Iraq. Sept. 3, 1939.

Netherlands. Sept. 1, 1939. *D. S. B.*, Oct. 14, 1939, p. 390-391.

DOROTHY R. DART

SUPREME COURT OF CALIFORNIA

THE PEOPLE *v.* STRALLA AND ADAMS ¹

Crim. No. 4227. In Bank. November 20, 1939

In this prosecution for the operation of a gambling ship anchored in the waters known as Santa Monica Bay, in determining whether such waters were intended to be included within the designated territorial boundary of the State, it was proper for the Supreme Court on appeal to examine historical data and maps, public papers and records, and to take judicial notice of geographical, historical and political data, even though the same had not been introduced in evidence in the trial court.

The geographic description of the waters known as Santa Monica Bay conforms to the definition of a bay; and while the extent of the harborage offered by such bodies of water varies, mere variations which become apparent in making comparisons with other harbors may not preclude judicial recognition of Santa Monica Bay as a harbor, in view of its geographic conformation and the history of its uses as such.

Adjacent waters to the distance of three miles, or a marine league, are territorial waters subject to the right of innocent passage by foreign ships; and what are territorial waters for the purpose of excluding foreigners from exercising unregulated fishing privileges therein has generally been the subject of convention between nations.

By the law of nations, a state can define its boundaries on the sea, and the extent of territorial jurisdiction is primarily a question for the law-making power; and Section 1, Article XXI, of the State Constitution declares that the territorial bounds of the State shall include the bays and harbors along its coasts, and in enacting the Fish and Game Code the legislature has followed such constitutional declaration in respect to the waters of Santa Monica Bay, designating nearly its entire area as State territory for the purpose of regulating fishing privileges.

A state has policing jurisdiction over its territorial waters; and the jurisdiction of the State extends over the waters of Santa Monica Bay landward from a line drawn between its headlands and for a distance of three miles oceanward from that line, and such jurisdiction may be exercised by the State for all proper purposes, including the prosecution of violators of the penal laws of the State.

Appeal by defendant from a judgment of the Superior Court of Los Angeles County, Frank H. Smith, Judge, of conviction of keeping and operating a gambling ship anchored in Santa Monica Bay, and from order denying a motion for a new trial. *Affirmed.*

On hearing after judgment in the District Court of Appeal, Second District, Division One (96 Cal. App. Dec. 846), *reversing* judgment of the Superior Court of conviction of keeping and operating a gambling ship anchored in Santa Monica Bay and order denying motion for a new trial. Judgment and order of the Superior Court *affirmed.*

The grand jury of the County of Los Angeles returned an indictment against the defendant Adams and others, charging the violation of subdivision 2, Section 337a, of the Penal Code. The specific accusation was the keeping and operating of the gambling ship *Rex* anchored in the waters of what is known as Santa Monica Bay, at a point four miles oceanward from the end of the municipal pier of the city of Santa Monica and approximately six miles landward from a line drawn between the headlands, Point Vicente on the south and Point Dume on the north. The defendant Adams appealed from the judgment of conviction and from the order denying his motion for a new trial.

There is no dispute as to the sufficiency of the evidence to support the jury's verdict if the offense was committed within the jurisdiction of the State. The appeal presents the single question whether the territorial

¹ 98 California Decisions, 440.

jurisdiction of the State of California extends over the area of the waters known as Santa Monica Bay. If it does, an affirmance of the judgment will be required.

The territorial boundaries of the State were defined in the Constitution of California of 1849, Article XII, Section 1, which fixed the ocean boundary of the State as:

thence running west . . . to the Pacific Ocean and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also, including all the islands, harbors, and bays along and adjacent to the coast.

That language was readopted in the Constitution of 1879, Section 1, Article XXI, without substantial change. Section 33 of the Political Code enacted in 1872 provides that the sovereignty and jurisdiction of this State extends to all places within its boundaries as established by the Constitution, subject to qualification in cases where jurisdiction has been ceded to or acquired by the United States Government.

The immediate problem for solution is whether the waters commonly known as Santa Monica Bay were intended to be included within the designated territorial boundary. The answer comprehends not one, but several factors, namely: Is this body of water a bay geographically? Is it a bay historically? Is it a bay legally?

For the purpose of considering those factors this court may examine historical data and maps, public papers and records, and may take judicial notice of such geographical, historical and political data even though the same have not been introduced in evidence in the trial court. (Code Civ. Proc., Sec. 1875; *Rogers v. Cady*, 104 Cal. 288; *Varcoe v. Lee*, 180 Cal. 338, 343.)

The waters known as Santa Monica Bay lie in an indentation of the California coast between Point Vicente and Point Dume. The points are distant from each other about 25 nautical miles or about 29 statute miles. The line of the coast forms a curve inward to a distance of about ten miles from a line drawn between the headlands. The line of the shore recedes slightly from Rocky Point, which is to the north of Point Vicente, making the distance between shores landward from Point Dume and Rocky Point greater than the distance between those two points. Otherwise the bay is widest between Point Vicente and Point Dume.

The foregoing geographic description appears to conform to the definition of a bay. Funk & Wagnalls *New Standard Dictionary* defines "bay" as "an indentation in the shoreline of a body of water; the water between two projecting headlands; sometimes, an arm of the sea connecting with the ocean." We find in Webster's *International Dictionary*: "An inlet of the sea, usually

smaller than a gulf, but of the same general character. The name is used, often for large tracts of water, around which the land forms a curve, or for any recess or inlet between capes or headlands; as, the Bay of Biscay; Hudson Bay." The *Oxford English Dictionary* (1933) gives: "An indentation of the sea into the land with a wide opening." The *Encyclopedia Britannica*, eleventh edition: "A wide opening or indentation in a coast line. This may be of the same origin as 'bay,' in the architectural sense, or from a Latin word which is seen in the place named *Baiae*." "A bay is a bending or curving of the shore of a sea or of a lake, and is derived from an Anglo-Saxon word signifying to *bow* or *bend*. For a similar reason the word bay is in Latin termed *sinus*, which expresses a curvature or recess in the coast." (The *State v. Town of Gilmanton*, 14 N. H. 467, 477.) A visual illustration of the outline of the land surrounding the waters known as Santa Monica Bay, and of the land and waters constituting San Pedro Bay, is reproduced herein from a portion of a map designated as *United States—West Coast California, San Diego to Santa Rosa Island* (geodetic survey charts numbers 5144 and 5147), with lines drawn between headlands added.² The waters known as San Pedro Bay extending from Point Fermin to the city of Huntington Beach, formerly called Point Lasuen, have been judicially declared to be a "bay". (*United States v. Carrillo*, 13 Fed. Supp. 212.) This map serves to give an easy and affirmative answer to the question whether the waters known as Santa Monica Bay are geographically a bay. Visually, if one of these bodies of water is a bay geographically, the other would seem also to be a bay.

Historically it appears that both Cabrillo (in 1542) and Viscano (1603) noted this body of water as "Gran Ensenada" or "Grand Bay" (Bancroft's *Works*, Vol. 18, *History of California*, Vol. 1, 1542-1800, p. 71; Paulen's *Atlas of Historical Geography of the United States*, plate No. 17). Both Spain and Mexico claimed and exercised exclusive jurisdiction over the waters of this coast as far as the mouth of the Columbia River, for a distance of ten leagues into the ocean, and such claim was confirmed by treaty with Great Britain in 1790. (See *Ocean Industries Inc. v. Superior Court*, 200 Cal. 235, 242.)

Historians refer to the waters as Santa Monica bay. (Ingersoll's *Century History of Santa Monica Bay Cities*, p. 121; Charles Sumner Warren, *History of Southern California; California Blue Book, 1932*, p. 520.) They indicate that the bay received its present name probably earlier than 1827; and that the city of Santa Monica was named later. Rand-McNally & Co.'s *Atlas of the World* (United States, 1908, p. 277), contains the following statement:

The sea-coast of California extends the entire length of the State and is indented by many bays and harbors, that of San Francisco being the finest on the Western coast, nearly fifty miles long and about nine miles wide. Other bays or harbors of importance are San Diego, San Pedro, Santa Monica, Santa Barbara, San Luis Obispo, Monterey, Tomales, Bodega, and Humboldt.

² Map omitted from this JOURNAL.—ED.

Before 1872 "Shoo Fly Landing" on Santa Monica Bay afforded shipping facilities for the La Brea rancho. (Ingersoll, *Century History of Santa Monica Bay Cities*, p. 141.) The same writer states (pp. 144-145) that in 1875, in conjunction with the construction of a railroad, a new wharf, 1700 feet in length, reaching a depth of 30 feet at low tide, was completed and the first ship landed at this wharf in June of that year. Collis P. Huntington, about 1892-1893, was instrumental in building the "Long Wharf," 4600 feet, at a cost of about \$1,000,000. (Newmark, *Sixty Years in Southern California, 1853-1913*.) Guinn's *Historical and Biographical Record of Southern California* (printed 1902, p. 139 *et seq.*), states facts showing the importance of Santa Monica as a shipping point.

The long struggle to obtain funds to establish a breakwater in either of Santa Monica or San Pedro bays as a port for Los Angeles, which ended in the selection and establishment of the port in San Pedro Bay, has become part of historical Californiana. (Article "The Battle for Southern Pacific Ports," by Lanier Bartlett, in *Westways*, August, 1935, pp. 26-29.)

The defendant quotes the following from the *United States Coast Pilot*, issued by the United States Department of Commerce under the supervision of the Coast and Geodetic Survey, page 57: "From Point Vicente to Point Dume, about 25 miles, the coast forms a broad open bight about ten miles wide known as Santa Monica Bay." He thus argues that an open bight is not a bay within the accepted terminology of what constitutes a bay. But we are also referred to the statement in the same survey that "Monterey Bay . . . is a broad, open bight, twenty miles long, between Point Pinos and Point Santa Cruz, and nine miles wide . . ." Monterey Bay was determined to be territorial waters in the case of *Ocean Industries Inc. v. Superior Court*, 200 Cal. 235.

The defendant contends that a body of water which may answer the definition of a bay, does not constitute a bay unless it also affords protection and safe anchorage to vessels engaged in shipping, and that Santa Monica Bay does not offer the advantages of a harbor. The evidence and the historical facts do not support the statement. The defendant refers to the discussion before the 54th Congress, 1896, as indicating a lack of secure refuge in Santa Monica Bay. But the evidence there produced does not necessarily negative the characteristics of Santa Monica as a bay or a harbor. The controversy centered on the problem of which bay, Santa Monica or San Pedro, was the better site for the project of establishing a port for Los Angeles.

In a history of the Los Angeles Harbor district, compiled by Ella A. Ludwig and published by the Historical Record Company, Inc. (California), referring to the report of the board of engineers appointed to investigate the question of which bay was the more eligible location for such a harbor, it is stated:

There was a lengthy and full comparison of the two places, Santa Monica and San Pedro. On the comparative advantages for arrival and

departure, the board held that there was no essential difference between the sites of San Pedro and Santa Monica. The question of distance from Los Angeles was declared to be unimportant . . . On the question of construction, after going into all details, it was declared in substance that the cost of San Pedro would be much less than at either of the locations suggested at Santa Monica.

The fact that San Pedro Bay was finally selected does not refute the evidence of use of Santa Monica Bay as a harbor. Nor is the fact that Santa Monica Bay affords less protection from northwesterly winds a controlling consideration. San Pedro Bay, situate on the southerly curve of the peninsula or projection of land formed by Point Vicente and Point Fermin, is open to southeasterly gales, as to which Santa Monica Bay, along the northerly curve of that peninsula, affords protection. Leading into the latter curve in Santa Monica Bay, a deep canyon, known as Redondo Canyon, provides passage for ships almost to the breakwater line along Redondo beach. Also, oceanward and to the northwest of Santa Monica Bay lie the islands of Santa Cruz and Santa Rosa; and to the southwest, Catalina and San Clemente islands. The position of the islands undoubtedly affords some protection against gales coming from their direction. In his *Century History of Santa Monica Bay Cities*, Chap. 1, p. 121, Ingersoll notes that "the waters of this bay are ordinarily quiet since the force of the waves is broken by the seaward islands and the deep, recessed position of the shoreline." Moreover, the *Rex*, which has no motive power of its own, has been anchored at the same point in Santa Monica Bay for the past five or six years. If the question whether Santa Monica Bay is a harbor were important in the solution of the problem presented, the foregoing fact would tend strongly to refute the contentions of the defendant that Santa Monica Bay, as a harbor, is not within the territorial waters of the State.

In discussing the legal sources on the question of what constitutes a bay, the defendant places reliance upon the case of *United States v. Morel*, 26 Fed. Cas. 1310, wherein a distinction was made between high seas, and roads, harbors and ports. After noting the distinctions made by Lord Hale in the fourth chapter *De Jure Maris*, the court said:

We see here a clear and reasonable distinction taken between the main sea or ocean, and such parts of its waters as may flow into places so situate and secured by the circumjacent land as to afford a harbor or protection for vessels from the winds, which make the sea dangerous. The open sea, the high sea, the ocean, is that which is the common highway of nations, the common domain, within the body of no country, and under the particular right or jurisdiction of no sovereign, but open, free, and common to all alike, as a common and equal right.

And, quoting from Lord Hale, the court continued

The expression [high seas] describes the open ocean where the dominion of the winds and waves prevails without check or control. Ports and

harbors, on the contrary, are places of refuge in which protection and shelter are sought, within the enclosures and projections of land.

It is obvious that the extent of the harborage offered by the places so described will vary; but mere variations which become apparent in making comparisons with other harbors may not preclude judicial recognition of Santa Monica Bay as a harbor, in view of its geographic conformation and the history of its uses as such.

Furthermore it does not appear that the law of nations defines, circumscribes or restricts the character of a body of water which may be included within the territorial boundaries of a country in accordance with the defendant's contentions. Many writers and courts have dealt with the question of what arms of the sea washing its coast may constitute the territorial waters of a sovereign state. It is now uniformly agreed that adjacent waters to the distance of three miles or a marine league are territorial waters subject, however, to the right of innocent passage by foreign ships. (Moore, *International Law Digest*, Vol. 1, p. 698 *et seq.*; The *Marianna Flora*, 11 Wheat. (24 U. S.) 1; The *Ann*, 1 Fed. Cas., p. 926; *In re Marinovich*, 48 Cal. App. 474, 477.) The prevailing claims of territorial jurisdiction over bordering waters and enclosed arms of the sea represent a diminution of the exclusive sovereignty over large bodies of water, such as the Adriatic, the Gulf of Genoa, the North Sea, and the Baltic Sea, which in earlier days were closed seas.

Thenceforward the progress of maritime jurisdiction was reversed—from *mare clausum* to *mare liberum*. And the sovereignty allowed by international law over portions of the sea is in fact a decayed and contracted remnant of the authority once allowed to particular states over a great part of the known sea and ocean. . . . The English claims dwindled to claims over territorial water close to the coast, and over portions of the sea interposed between promontory and promontory known as the King's Chambers, and over the whole of the narrow seas for ceremonial purposes.

(Maine, *International Law*, 77, 79; see also Maxey, *International Law*, p. 228 *et seq.*) The latter authority says: "That the jurisdiction of a state over its marginal waters rests upon international rather than municipal law seems to admit of little doubt;" but he at the same time admits that there is no room for doubt that there exists the right to exercise such jurisdiction, and that the only dispute is as to the extent of it.

What are territorial waters for the purpose of excluding foreigners from exercising unregulated fishing privileges therein has generally been the subject of convention between nations. (See Moore, *supra*, p. 716 *et seq.*; Note 46 L. R. A., p. 270.) In 1884 (150 MS. Dom. Let. 6; Moore, *supra*, p. 718), Mr. John Davis, Assistant Secretary of State, in a reply concerning the subject of whale fishing off Bahia Bay on the Brazilian coast, expressed the following:

The general law and rule is understood by this Government to be that beyond the marine league or three-mile limit, all persons may freely catch whale or fish. In computing this limit, however, "bays" are not taken as a part of the high seas; the three miles must be outside of a line drawn from headland to headland.

It is of important significance that our State Legislature has designated nearly the entire area of Santa Monica Bay as State territory for the purpose of regulating fishing privileges in those waters (Fish and Game Code, Stats. 1929, p. 1181, Stats. 1933, p. 394, Sec. 88), and has thus asserted the jurisdiction of the State for that purpose in and over the waters wherein the *Rex* is anchored.

One of the rights which it is stated justifies the doctrine of the territoriality of adjacent waters, is the right to exercise "surveillance of ships which enter those waters, whether passing through or stopping there . . . in order to guarantee the efficient police and the development of the political, commercial, and fiscal interests of the bordering state". (Moore, *Digest of International Law*, *supra*, pp. 698-699.) Such right exercisable in adjacent waters would necessarily also be appropriate in territorial bays, harbors and inlets. The same authority indicates that the headland doctrine has received some limitation when the question has become the subject-matter of convention between nations. The three-mile limit applicable to adjacent waters was in some instances taken as restricting other coastal territorial waters to those inlets having an entrance six miles or two marine leagues in width. (See *Commonwealth v. Manchester*, [1890] 152 Mass. 230; *Manchester v. Commonwealth*, 139 U. S. 240; *Mahler v. Norwich and New York Transportation Co.*, 35 N. Y. 352, 355.) A ten-mile headland doctrine has been asserted (Moore, *supra*, p. 720). In 1896, when the extension of the territoriality of adjacent waters from one to two marine leagues was a subject of diplomatic conversation, Mr. Richard Olney, Secretary of State, observed that "an extension of the headland doctrine, by making territorial all bays situated within promontories twelve miles apart instead of six, would affect bodies of water now deemed to be high seas and whose use is the subject of existing conventional stipulation." (Moore, *supra*, p. 735.)

Prior to that time, however, the United States had asserted jurisdiction over the waters of Delaware Bay. (Opinion of the Attorney-General, Edmund Randolph, 1793, Am. State Pap. For. Rel. L, 148; 1 Op. At. Gen. 32; *State v. Morris*, 1 Harr. [Del.] 326.) The opinion of the Attorney-General was concerned with the question whether the brig *Grange* was seized within territorial waters of the United States. The Attorney-General quoted from and discussed the opinions of early text writers as authority for his conclusion that such waters were territorial, and then made this statement:

These remarks may be enforced by asking, What nation can be injured in its rights, by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the con-

trary ground? It communicates with no foreign dominion; no foreign nation has, ever before, exacted a community of right in it, as if it were a main sea; under the former and present governments, the exclusive jurisdiction has been asserted. . . .

Bristol Channel was held to be British territorial waters. (*Reg. v. Cunningham*, [1859] Bell's C. C. 72, 86.) Conception Bay on the coast of Newfoundland, having an average width of fifteen miles with the distance between the headlands more than twenty miles, has also been declared to be British territorial waters. (*Direct United States Cable Co. v. Anglo-American Telegraph Co.*, [1877] L. R. 2 App. Cas. 394.) In the course of the opinion in that case it was said:

Passing from the Common Law of England to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbours, estuaries, and bays land-locked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose.

It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon shot from shore to shore, or three miles; some a cannon shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg. v. Cunningham* (Bell's Cr. C. 72) was decided to be in the County of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his Commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable.

It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule the difficulty of the task would not deter their Lordships from attempting to fulfil it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland.

On the other hand, we may note that by treaty between the United States and Great Britain, it was settled that the former government has no exclusive jurisdiction in the waters of Behring Sea outside of the three-mile limit. (27 Am. L. Rev. 703; *La Ninfa*, 75 Fed. Rep. 513.)

Chesapeake Bay, with an entrance of twelve miles between the headlands, was declared to be territorial waters. (Second Court of Commissioners of Alabama Claims, *Stetson v. United States*, No. 3993, Class 1.) It was there said:

Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory . . . ; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig *Grange* and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the "high seas" within the meaning of the term as used in Section 5 of the Act of June 5, 1872.

In *Manchester v. Massachusetts*, 139 U. S., at page 264, the Supreme Court of the United States said:

The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and except so far as any right of control over this territory has been granted to the United States, this control remains with the State. . . . The statutes of the United States define and punish but few offences on the high seas, and, unless other offences when committed in the sea near the coast can be punished by the States, there is a large immunity from punishment for acts which ought to be punishable as criminal. Within what are generally recognized as the territorial limits of states by the law of nations, a state can define its boundaries on the sea and the boundaries of its counties; and by this test the Commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties.

Therefore the "jurisdiction of the State of California over the sea is that of an independent nation" (*Humboldt Lumber Manufacturers' Assn. v. Christopher*, 44 U. S. App. 434, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264, 282), with the right to decide and prescribe its own boundaries.

The extent of territorial jurisdiction is primarily a question for the law-making power. (See Note 46 L. R. A., p. 268.) In the case entitled *La Ninfa*, 75 Fed. 513, 518, it was said that in such controversies doubtful questions not thus decided are beyond the sphere of judicial cognizance and must be met by the appropriate department of the State. It is true that the legis-

lature has not expressly designated the boundaries of the State. But the fundamental law (Const., Art. XXI, Sec. 1) has declared that the territorial bounds of the State shall include the bays and harbors along its coast; and in enacting the Fish and Game Code the Legislature has followed the constitutional declaration in respect to the waters of Santa Monica Bay. Moreover, it is doubtful whether the Legislature, in view of the constitutional section, could renounce a right of territorial domain or abdicate any rights of dominion over waters which for a period of at least 400 years have been considered to be a bay, and over which the State has exercised territorial jurisdiction. (*Ocean Industries Inc. v. Superior Court*, 200 Cal. 235; *Mahler v. Transportation Co.*, 35 N. Y. 352.) And certainly this court will not presume to do what the Legislature could not do. What was said in the case of *Ocean Industries Inc. v. Superior Court*, *supra*, also serves to refute any inferences which might otherwise be considered to flow from legislative acts fixing the boundaries of Los Angeles County and the city of Santa Monica. (See Stats. 1850, p. 59; *Muchenberger v. City of Santa Monica*, 206 Cal. 635, 638.) In the absence of any controlling legislative or executive act or judicial decision, the court will look to the international law, namely, the customs and usages of civilized nations. (*The Paquete Habana*, 175 U. S. 677, 700.) But resort to the law of nations does not disclose any agreed definition of what constitutes a bay which may be included within the territorial waters of a state. (See, also, *Ocean Industries Inc. v. Superior Court*, *supra*, p. 246.) On the contrary, as the foregoing discussion indicates, the usage and custom appears to be established to the effect that where, as here, the facts are that the bay is not and cannot become a pathway between nations; that exclusive jurisdiction has been asserted under both the present and former governments; that it has been recognized as a bay and as a harbor within the territorial boundaries of the state as prescribed by the law of the land, the courts have decided in accordance with the jurisdictional claim.

That a state has policing jurisdiction over its territorial waters may be said to be settled by the authorities herein cited. (See, also, *Cunard S. S. Co. v. Mellon*, 262 U. S. 100.) In that case it was said:

It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. . . . "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

(Quoting from opinion of Chief Justice Marshall, in *The Exchange*, 7 Cranch, 116, 136.)

In line with the foregoing considerations the Bay of San Pedro (*United States v. Carrillo*, 13 Fed. Supp. 212), and Monterey Bay (*Ocean Industries, Inc. v. Superior Court*, 200 Cal. 235), have been judicially recognized as territorial waters of the State. There is not such a difference between the configuration and expanse of those bays and of Santa Monica Bay as would compel the invocation of the "rule of reason" referred to in the *Carrillo* case, for the purpose of rejecting the contention that Santa Monica Bay is within the territorial boundaries of California. That rule of reason does not persuade us to conclude that the waters of Santa Monica Bay, *per se*, beyond three miles from the shore, constitute a part of the open or high seas. We are not here concerned with a body of water comparable to the Behring Sea, or to the Gulf of Mexico mentioned as an example in the *Carrillo* case.

We conclude that geographically the waters known as Santa Monica Bay conform to the definition of a bay; that historically for a period of at least 400 years they have been known as a bay and during a large portion of that period have been used as a harbor; that the claimed jurisdiction of the executive department of the State is in conformity with the law of nations; therefore, that Santa Monica Bay is one of the bays and harbors included within the territorial boundaries of the State by the Constitution. It follows that the jurisdiction of the State extends over the waters of Santa Monica Bay landward from a line drawn between its headlands, Point Vicente and Point Dume, and at least ³ for a distance of three miles oceanward from that line, and that such jurisdiction may be exercised by the State for all proper purposes including the prosecution of violators of the penal laws of the State.

The judgment and the order are and each is affirmed.

SHENK, J.

We concur:

CURTIS, J.

WASTE, C. J.

GIBSON, J.

CARTER, J.

Mr. Justice HOUSER did not participate in the foregoing decision.

³ Words "at least" inserted in the opinion by the court on Dec. 19, 1939.—ED.

**MIXED CLAIMS COMMISSION—UNITED STATES AND
GERMANY**

UNITED STATES OF AMERICA ON BEHALF OF LEHIGH VALLEY RAILROAD
COMPANY, AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY,
LIMITED, AND VARIOUS UNDERWRITERS, CLAIMANTS, *v.*
GERMANY¹

Docket Nos. 8103, 8117, *et al.*

December 15, 1933

DECISION OF THE COMMISSION

The Commission is competent to determine its own jurisdiction by the interpretation of the agreement creating it.

The Commission is a tribunal sitting continuously with all the attributes and functions of a continuing tribunal until its work shall have been closed.

Where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules.

The Commission has no jurisdiction to reopen a case for the presentation of after-discovered evidence.

Every tribunal has inherent power to reopen and to revise a decision induced by fraud while it still has jurisdiction of the cause.

The national Commissioners are in disagreement upon certain questions arising in these cases. These questions will best be understood by a brief statement concerning the history of the proceedings.

The memorials were filed by the American Agent in the Black Tom case on March 16, 1927, and in the Kingsland case on March 26, 1927. The answers of Germany were filed on December 14, 1927, and January 17, 1928, respectively. Both Governments assembled evidence before and after the filing of the memorials. With considerable further evidence presented after the premature argument of April 3-12, 1929, the cases of the respective Governments again appeared to be completed so that submission and oral argument could be had in April, 1930. It then developed that some evidence had recently been elicited on behalf of the United States which made it certain that both Governments would wish to file additional evidence, so the hearing was by agreement adjourned to September 18, 1930, and both Governments submitted their cases at The Hague September 18-30, 1930, on the record as then made. The Commission reached its decision dismissing both cases on October 16 and communicated it to the two Governments on November 13, 1930.²

On January 12 and 22, 1931, the American Agent filed petitions for rehearing and reconsideration, which assigned as reasons for the requested

¹ Report of American Commissioner, Mixed Claims Commission—United States and Germany, Dec. 30, 1933, p. 63.

² Decision printed in this JOURNAL, Vol. 25 (1931), p. 147.

action that the Commission had misapprehended the facts and committed errors of law. These petitions were considered and dismissed by the Commission in an opinion of March 30, 1931. On the same date the Commission addressed a letter to the two Agents in which it said:

In the decision handed down today in the Sabotage Cases the Commission has decided the matter of rehearings in these cases so far as the rehearing petitions therein are based on allegations of obvious error. This decision is related to the record as it stood when the cases were decided, and the decision reserves the question of the proposed admission of new evidence, which is a separate question.

The Commission asks me to advise you that it desires the two Agents, without waiting for the presentation of any additional new evidence, to submit briefs discussing, first, the jurisdictional considerations and legal principles which should govern the Commission's decision as to the admission of new evidence in these cases, and, second, what kind of new evidence, if any, should be admitted.

The Commission in this connection points out that the two Agents have already presented some argument on the question of new evidence and each Agent has based his argument in part on the decision of the Commission in the Philadelphia-Girard National Bank case. To avoid further discussion as to the proper interpretation of the language used by the Commission in that case we think it best to advise you that the National Commissioners are agreed that it was the intention of the Commission in that decision to rule against the introduction of further evidence of any kind after the evidence had once been closed and a decision promulgated. This ruling is not irrevocable, but it is desirable that argument addressed to the question should be devoted not to the interpretation of that language but to the principle itself. The Commission has not seen the new evidence offered by the American Agent in the Sabotage Cases, but the descriptions of this evidence in his motions filed March 5 and 11, 1931, give the impression that the evidence offered is not new and is not of the character which courts admit after a decision is once made in cases where, after a decision, they admit any new evidence.

The Commission accordingly requests that the Agents file their briefs on the points above mentioned within two weeks, with leave to each Agent to file a reply brief within one week after the receipt of the other Agent's brief.

Pursuant to this letter briefs on the question of the Commission's power to reopen and rehear were filed April 27, 1931. Reply briefs were not filed, for reasons not necessary to state here. On July 1, 1931, the American Agent presented a supplementary petition for rehearing covering both cases, on the ground of newly-discovered evidence, and in it set forth that he had procured much additional evidence, some of which had been filed and the balance of which was being filed with the petition. The German Agent offered no evidence (he tendered none from the time of the Hague argument until January 9, 1932). A hearing was had at Boston July 30-August 1, 1931. The Commission did not pass upon its power to reopen and rehear the cases at that time, but reserved that question until it should have opportunity to

examine the new evidence filed. The Commission then stated that perhaps it would need the assistance of an impartial expert to be retained by it to assist it in appraising certain of the documentary evidence filed by the American Agent. This matter was under advisement for some time, and on October 14, 1931, the Umpire, with the concurrence of the Commissioners, forwarded a joint letter to the two Agents stating as follows:

It has proved impossible to carry out the American Agent's suggestion that Mr. Osborn be employed by the Commission. Mr. Osborn himself is unwilling; the American Agent now objects; the German Agent's consent is subject to restrictions, and the Commission could not accept restrictions. The Commission has now decided not to make further search for a satisfactory expert. In view of Mr. Osborn's standing in his profession, we would welcome the presentation of his testimony if the German Agent himself desires to offer it. The Commission still reserves its decision as to its right to admit new evidence in these cases.

Pursuant to this letter the German Agent on January 9, 1932, filed an affidavit by A. S. Osborn with certain annexes and over a period from January 9 to August 15-29, 1932, filed additional annexes to Osborn's affidavit.

The present Umpire was appointed to fill the vacancy, caused by Mr. Boyden's death, on March 24, 1932, and on April 8, 1932, a session of the Commission was held in order to bring the matter to a head and end the existing confusion. Pursuant to the agreement of the two national Agents an order was entered to the effect that the American Agent should conclude the filing of his evidence in support of his supplementary petition on or before June 1, 1932, and the German Agent file any evidence he cared to present in reply on or before August 15, that briefs should be exchanged and filed on or before September 15, and that the matter should be argued beginning November 1, 1932. The American Agent reserved no right to file reply evidence to that presented by the German Agent but he did assemble reply evidence, and, in order to give him additional time for its presentation, he was allowed until November 15 and the hearing was adjourned to November 21. Permission was also given to both Agents to file briefs not later than the close of the argument. It will be observed that during the entire period from March 30, 1931, to November 21, 1932, what had occurred was subject to the decision of the question of the Commission's jurisdiction to reopen the cases.

By mutual consent the hearing of November 21-25, 1932, was without prejudice to Germany's objection to the Commission's jurisdiction, all agreeing that if the new evidence filed would not change the result reached in the decision of October 16, 1930, the jurisdictional question need not be answered. The national Commissioners disagreed as to the effect of the new evidence, and the question of its effect therefore came to the Umpire for decision. He

rendered the decision of the Commission of December 3, 1932, holding the new evidence not sufficient to change the original findings and dismissing the petitions for rehearing.³

The matter had gotten into such shape that the method of procedure adopted seemed the only practicable one. It was at best an unsatisfactory method, and—without meaning any criticism of anyone—I am convinced, as the matter is now viewed in retrospect, it would have been fairer to both the parties definitely to pass in the first instance upon the question of the Commission's power to entertain the supplementary petition for rehearing, as requested on May 27, 1931, by the American Agent. The reception or rejection of the new evidence would have been a consequence of the decision of that question. As will be seen from the decision of December 3, 1932, Germany insisted upon its objection to the jurisdiction of the Commission to rehear, and the United States asserted that the Commission had such jurisdiction. The German Commissioner reserved the question in the certificate of disagreement upon which the Umpire's functioning was grounded.

On May 4, 1933, a single petition was filed by the American Agent (signed by four firms of private counsel for claimants and countersigned by the American Agent) for a rehearing of both cases, which averred (1) "That certain important witnesses for Germany, in affidavits filed in evidence by Germany, furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants," (2) "That there are certain witnesses within the territorial jurisdiction of the United States," some of whom are specifically named in the petition, "who have knowledge of facts and can give evidence adequate to convince the Commission of the liability of Germany for the destruction of the Black Tom Terminal and the Kingsland plant, but whose testimony cannot be obtained without authority to issue subpoenas and to subject such witnesses to penalties for failure to testify fully and truthfully," (3) that evidence can be produced "to show that the Commission has been misled by the German evidence," (4) "That there has also come to light evidence of collusion between certain German and American witnesses of a most serious nature to defeat these claims."

This petition was filed with the proper officers of the Commission, but no action has been taken upon it.

In May, 1933, the Umpire was apprised of the disagreement of the American and German Commissioners with respect to the power of the Commission to entertain the application. The German Commissioner by letter of May 5, 1933, addressed to the Umpire, enclosing a copy of his letter to the American Commissioner of even date and a copy of his opinion on the question of reopening, brought the situation to the attention of the Umpire. The German Commissioner's letter is as follows:

³ Printed in this JOURNAL, Vol. 27 (1933), p. 345.

Hamburg, May 5th 1933.

My dear Mr. Justice,

I beg to hand you herewith a copy of a letter I wrote to Mr. Anderson and also a copy of an opinion I wrote on the question whether or not our Commission has the right to reopen a case.

Though from a strictly formal point of view you, as our Umpire, are not interested in the question but after it has been certified to you by the two National Commissioners, I feel it is my duty to keep you informed on what is going on, since I am afraid that Mr. Anderson and I might not agree on the issue.

I remain, my dear Mr. Justice,

Very sincerely yours,

(Signed) W. Kiesselbach.

Mr. Justice Owen J. Roberts,
United States Supreme Court,
Washington D. C.

His letter to the American Commissioner appears in the minutes of the Commission's meeting of October 31, 1933, and his opinion enclosed therewith and the American Commissioner's opinion are embodied in the American Commissioner's certificate of disagreement handed to the Umpire at that meeting. An additional opinion of the German Commissioner was filed on November 22 and a supplemental opinion of the American Commissioner on November 27.

The foregoing statement will serve to disclose the nature of the points upon which the Commissioners are in disagreement. A preliminary question of procedure arises which must also be decided. It may be stated as follows: May the Umpire, in the absence of a joint certificate submitting that question to the Umpire, decide a question as to which the two national Commissioners are in disagreement? If this preliminary question be answered in the affirmative, then two others of substance remain for decision, as follows:

Has the Commission the power to pass upon the extent of its own jurisdiction?

If it has, then does this jurisdiction extend to the reopening of a case, once decided, by reason of after-discovered evidence, or disclosure that testimony offered was fraudulent, or a showing of collusion between witnesses for the two Governments, and that, in consequence, the Commission was misled by the record as made at the time of its decision?

Orderly procedure would have required that these issues be decided by the Umpire before the filing of the tendered evidence, since the right to tender such evidence is involved in the decision. The American Agent has, as I am advised, filed a very large quantity of evidence, which, in view of the questions of power now mooted, I have thought it improper to examine or to treat as forming part of the record in the cases.

Addressing myself to the preliminary question of procedure, I conclude that the disagreement of the national Commissioners is before me in such

manner as to make it my duty, under the Agreement of August 10, 1922,⁴ between the two Governments, to take cognizance of the disagreement and decide the questions involved. The agreement provides, in Article II, "The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings." The duty of the Umpire under the plain terms of the document arises automatically upon a disagreement between the Commissioners and his being apprised thereof. Under the agreement no formal act is required to bring into operation the authority thus vested in the Umpire. Rule VIII (a), entered February 14, 1924 (amending that rule as originally enacted on November 15, 1922), reads:

The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified.

But rules adopted by the Commission as a matter of its own convenience and for the guidance of the national agents can not contravene the explicit terms of the instrument which created the Commission. This brings me to the questions of substance.

May the Commission pass upon its own jurisdiction?

The agreement of the two Governments created the Commission to deal with three classes of claims specified in Article I arising by reason of obligations undertaken by Germany under the Treaty of Berlin of August 25, 1921. While at the date of the execution of the agreement, August 10, 1922, it was known that such claims would be numerous and amount in the total to a huge sum, the nature and the validity of the separate claims which might be submitted were unknown. It was for the purpose of passing upon these claims, both as to validity and amount, that the Commission was created. At the very threshold the tribunal might encounter in each case the question whether the claim presented fell within the categories of those to be adjudicated or was outside the scope of the treaty and the agreement. In this aspect the Commission was bound to determine its own jurisdiction, and for that purpose to interpret and apply the terms of the agreement which created it.

A decision that it had jurisdiction of a claim was by the very terms of the agreement to be accepted by both Governments as final and binding upon them (Article VI). The agreement submits the questions for decision as

⁴ For convenient reference a printed copy of the agreement is appended hereto. [Omitted from this print. The agreement was printed in this JOURNAL, Supplement, Vol. 16 (1922), p. 171.]

between the two Governments to the Commission. What those questions are must be determined within the four corners of the instrument. It is not within the competency of either Government to retract the authority which it conferred upon the Commission. If that body may not from the terms of the agreement ascertain what power was conferred, it would be wholly incompetent to act except in an advisory capacity, and none of its decisions could in the nature of the case be accepted as final and binding by the Governments, as the agreement states they shall be. How the Commission shall proceed with its task, the form of pleading to be adopted, the manner of hearing (subject to what is hereafter stated in respect of Article VI), the form and entry of its decisions, its control over a case after a decision is rendered, are all left to its determination and regulation.

The agreement is to be read in the light of its language and its purpose; and where it is silent, the powers and duties of the Commission are to be determined according to the nature of the function entrusted to it. I have no doubt that the Commission is competent to determine its own jurisdiction by the interpretation of the agreement creating it. Any other view would lead to the most absurd results—results which obviously the two Governments did not intend.

This brings me to the second question of substance.

Has the Commission the power to reopen a case upon the showing made by the pending petition?

The answer to this question must also be found in the terms of the agreement creating the Commission. On the one hand it is pointed out that the preamble refers to the desire of the parties that "the amount to be paid by Germany in satisfaction of Germany's financial obligations . . ." be determined. The fact that "amount" is singular rather than plural and while various claims of American citizens and the Government are involved, in the ultimate Germany is to pay a total ascertained by the addition of all the claims allowed, is said to make the Commission the arbiter of a single suit or action consisting of thousands of counts, each count representing the claim of an American national or of the Government of the United States. It is insisted that the Commission is limited by few covenants, rules, or directions to be found in the agreement, that it may proceed practically as it sees fit to accomplish the task committed to it, that its only concern is justice and equity as between the nations signatory to the agreement, and that if in justice and equity it should rehear a case nothing in the agreement or in the constitution of the Commission stands in the way. The argument is that in effect the tribunal sits without terms or sessions as a continuing tribunal, trying a single case, and its doors are never closed to the litigants before it until it shall have completed this task and formally disbanded.

On the other hand it is contended that each of the claims presented constitutes a case within the meaning of the agreement; that each is initiated by a petition or memorial to which an answer is filed, thus making up an issue

for trial; that it was intended, when the Commission reached a decision in any such case, the decision should be final and binding upon the parties; that the Commission is without power, once it has rendered its decision in a case, to reopen or rehear it for any reason.

I think these positions are both extreme and that neither represents the true construction of the agreement or an accurate definition of the Commission's powers.

I am not persuaded that the use of the word "amount" in the preamble makes the Commission a tribunal to try a single action divided into counts. There is much to indicate that, while the total of the awards is to be taken to make up the amount due by Germany, the claims presented are to be treated as individual cases. Thus in Article II, where reference is made to the selection of the Umpire, his function is amongst other things specified as "to decide upon *any cases* concerning which the commissioners may disagree, . . ." And cases are in this sentence distinguished from questions. Article IV provides that "The commissioners shall keep an accurate record of the questions *and cases* submitted. . . ." The uniform practice of the Commission indicates this understanding of its function, for each claim has been treated as initiating a separate case and has eventuated in a separate decision (a decision of it as a separate case: even though as a convenience the Commission in one document frequently dismissed a number of claims and less frequently rendered awards in a number of cases, each received the same treatment as if the decision thereof had been expressed in a record devoted to it alone). On the part of the United States this method of dealing with the claims has been recognized in the Settlement of War Claims Act of 1928 where provision is made for the certification to the Treasury of the awards of the Commission as they are made upon individual claims.

My view is that the Commission is a tribunal sitting continuously with all the attributes and functions of a continuing tribunal until its work shall have been closed; and that as such tribunal it is engaged in the trial and adjudication of a large number of separate and individual cases.

The German Government would have me draw from these premises the ultimate conclusion that the Commission is without power to reopen any case in which it has made a decision, and in support of this view refers to the last paragraph of Article VI, which provides "The decisions of the commission and those of the umpire (in case there may be any) *shall be accepted* as final and binding upon the two Governments." This paragraph, in my judgment, furnishes no aid to the German argument. It is a covenant as between the two nations binding each of them with respect to any decisions which may be made. But it is to be observed that neither this paragraph nor any other provision of the agreement purports to define what is or what shall be considered a "decision of the commission." It is left to the Commission to determine when its decision upon any claim is final. It has no concern with the action taken in consequence of its awards. It is a matter for the two sov-

ereigns to carry out their agreement that they shall accept the decisions as final and binding. If a decision should be revised by the Commission as a result of a rehearing and a new decision reached in a particular case, the Commission would have no concern with the adjustment of the settlement consequent upon its action. A court may often render a judgment which, by reason of what has occurred, it is not possible to execute in accordance with its terms, but the mere fact that the judgment may be incapable of execution in part or in whole in no way alters the jurisdiction of the tribunal or indeed its duty to render such judgment as to justice and right may appertain.

With this preliminary general statement as to the jurisdiction of the Commission, I address myself to a determination of its power to reopen a case in which it has rendered a decision.

1. I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules. My understanding is that the Commission has repeatedly done so where there was palpable error in its decisions. It is said on behalf of Germany that this has never been done except where the two agents agreed that such course under the circumstances was proper. And the argument is drawn from this fact that the Commission is without power to take such action of its own motion or in the face of opposition by either agent. I can not follow this argument.

If the Commission's decisions once made are final and the body wholly without power to reopen them, then a case once decided can only be reopened by a formal agreement of the two Governments amending the agreement under which the Commission sits, for no additional power can be conferred upon the tribunal except by the parties who called it into being and gave whatever jurisdiction it originally possessed. If, therefore, a case may be reopened by consent, the same action may be taken without consent. The first petition for reopening and rehearing filed in these cases by the American Agent was based on grounds such as are above described. I have no doubt that the Commission had power to consider that petition and to deal with the case in the light of the matters it brought forward.

2. I come now to the question of jurisdiction to reopen for the presentation of what is usually known in judicial procedure as after-discovered evidence. I am of opinion that the Commission has no such power.

In cases where a retrial is granted or a reopening and rehearing indulged for the submission of so-called after-discovered evidence, this is usually by a court. It is to the interest of the public that litigation be terminated, and municipal tribunals have the power to set a case for trial and to compel the

parties to proceed. While they will not compel a litigant to proceed without hearing his reasons for delay, neither party has a right to hold the case open until he feels that he has exhausted all possible means of obtaining evidence. If such right existed, courts would be unable to function. By analogy, if this Commission had the power to make an order to close the proofs in any case and compel the parties to proceed, either party who was not then ready, because it had not exhausted its sources of information and evidence, might well have an equity to ask a reopening that it might be permitted to offer evidence theretofore unavailable.

But the situation here is quite otherwise. Article VI, second paragraph, provides "The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim." All must admit the parties intended the Commission should not sit indefinitely but should expeditiously complete its work. The agreement provides that all claims to be considered must be brought to the Commission's attention within six months of its first session. But, on the other hand, no time limit whatever was set in the original agreement for the closing of proofs. In contradistinction, such a mandatory provision for closing proofs was embodied in the supplementary agreement of December 31, 1928, as to claims embraced within the scope of that instrument.

The Commission has from its inception been sensible of its lack of power to compel the closing of the record and the final submission of any case. While it has urged the Agents to complete their records and to submit and argue their cases upon such completion and has sought the coöperation of the Agents to bring the cases to final submission, it has never, as I am advised, entered an order for the final closing of the record in any case without consent or over objection. I do not think it has power so to do. The clause quoted from Article VI compels the reception of any written statement or document presented by either party. As I read this provision, so long as either party is of opinion that written statements or documents are or may be available in support of its contention it may of right demand that the Commission await the filing thereof before final submission of the cause. The American Agent was under no obligation to close his record and submit his case at The Hague if he knew, or had reason to expect, that further evidence was obtainable.

It is suggested in the petition for reopening that the United States was unable to obtain the evidence from certain witnesses without the power to compel their testimony. This fact was as obvious in the autumn of 1930 as it is today. The German Government availed itself of its ordinance of June 28, 1923, which permitted the summoning of witnesses, placing them under oath, examining them before a court, and rendering them liable to penalty for false-swearing. No reason is apparent why a similar statute could not at any time have been adopted in the United States. The best

evidence that it could is that when the American Agent and the Department of State requested the passage of such a law it was promptly enacted and has been availed of in obtaining evidence now proffered (Act of June 7, 1933). The lack of an instrument which would have been ready to hand if requested can not excuse the failure to obtain the testimony thereby obtainable.

The agreement does not contemplate that when the two Agents signify their readiness to submit a case and do submit it upon the record as then made to their satisfaction, obtain a hearing and decision thereon, the Commission shall have power to permit either Agent to add evidence to the record and to reconsider the case upon a new record thus made.

3. The petition now under consideration presents, in the main, a situation different from either of those above discussed. Its allegations are that certain witnesses proffered by Germany furnished the Commission fraudulent, incomplete, collusive, and false evidence which misled the Commission and unfairly prejudiced the claimants' cases; that certain witnesses, including some who previously testified, who are now within the United States, have knowledge and can give evidence which will convince the Commission that its decision was erroneous; that evidence has come to light showing collusion between certain German and American witnesses to defeat the claims. These are serious allegations, and I express no opinion of the adequacy of the evidence tendered by the American Agent to sustain them. I have refrained from examining the evidence because I thought it the proper course at this stage to decide the question of power on the assumption that the allegations of the petition may be supported by proof, postponing for the consideration of the Commission the probative value of the evidence tendered.

The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand.

Done at Washington December 15, 1933.

OWEN J. ROBERTS
Umpire

BOOK REVIEWS AND NOTES

Evidence before International Tribunals. By Durward V. Sandifer. Chicago: Foundation Press, 1939. pp. xii, 336 of text, 69 of appendices and bibliography. Table of cases. Index. \$10.

This careful work by the Assistant to the Legal Adviser of the Department of State fills a long-felt want of students and practitioners of international law. The volume is fully documented in footnotes which indicate that the author has covered an immense amount of material. The author shows that the sources of the rules of evidence before international tribunals are the arbitral agreement between the government parties, the rules of the tribunal, and the rules of customary law not contrary to the *compromis*. The customary rules are those which have been developed from a long succession of rules of such tribunals. The purpose of the book, it appears, is to state and evaluate the practice in these regards and to try to extract principles therefrom with the aid of analogies drawn from the Civil Law and the Anglo-American system. As all of the forums are, with few exceptions, *ad hoc* tribunals established and empowered by special arrangements, this study should be useful in negotiating arbitration agreements in order to avoid the pitfalls and errors of the past and in the production of evidence thereunder. However, the negotiated agreement, which generally represents a compromise between the views of the high contracting parties, may be far from the ideal.

The volume covers the order and time of submission of evidence, the rights and obligations of the parties and the authority of the tribunal in respect to production of evidence, and the rules as to admission of evidence. Documentary evidence, the "best evidence" rule, *ex parte* evidence, authentications and translations, testimonial evidence, including expert evidence, are given special treatment. A chapter is devoted to the admission and evaluation of the evidence of interested persons and hearsay evidence, and another chapter covers matters of judicial notice and the question of proving sovereign assertions. A final chapter deals with the rehearing and revision of cases on the basis of newly discovered or fraudulent evidence. The latest decisions on these questions are those of the Mixed Claims Commission, United States and Germany, in the Sabotage Cases.

The author brings out that the distinctive characteristics of international procedure are, generally speaking, freedom from restrictive rules in the admission of evidence, the evaluation of evidence by the tribunal, the use of written evidence in preference to oral testimony, the lack of power to compel the attendance of witnesses,¹ the extensive use of the affidavit and deposi-

¹ The Act of July 3, 1930, empowers any international tribunal to which the United States is a party to subpoena witnesses and papers. The Act of June 7, 1933, allows the

tion, the power to request or search for further evidence, and considerable latitude in drawing up rules of procedure by the instant tribunal.

The appendices include the Statute and Rules of the Permanent Court of International Justice, The Hague Conventions and the Conventions establishing the Central American Court of Justice and the International Central American Tribunals and the Rules of the latter.

L. H. WOOLSEY

Responsibility of States for Acts of Unsuccessful Insurgent Governments. By Haig Silvanie. New York: Columbia University Press; London: P. S. King & Son, 1939. pp. 223. Index.

This useful study deals with responsibility of states for acts of unsuccessful insurgents under five headings: (1) Insurgent Loans, (2) Concessions and Alienations, (3) Acts of Government Routine, (4) Taxes and Customs Duties, and (5) Tortious Acts. There is no separate section on the status of insurgents under international law generally, although attention is given incidentally to matters of recognition, the circumstances under which insurgents become "authorities" in all or sections of a country, and the distinction between those acts really insurrectionary (acts of a political or military nature, incidental to civil conflicts, and for public ends) and those which constitute brigandage and crime.

The treatment is carefully analytical and depends almost entirely upon official sources. The author finds that there has been some development, through adjudications, toward the concession of a greater degree of liability for insurgent acts and contracts than was conceded in the nineteenth century, on the theory that an unsuccessful insurgent government is not wholly alien to the state. On particular points, among others, he concludes that the public loan from the United States to the Provisional Government of Russia in 1917 is binding upon the Soviet Union (pp. 56, 57), and that certain decisions of the United States Supreme Court after the American Civil War provided the source from which the Mexican-American General Claims Commission derived its conclusions as to the distinction between acts of government routine and acts in aid of a rebellion (pp. 98-102).

It might have been useful to show who the particular arbitrators were in some cases where this has not been done. Certain matters relating to the effect of recognizing insurgency (pp. 153-154), and to better-than-national treatment (p. 197) seem controversial.

ROBERT R. WILSON

Revisions of the Treaty of Versailles. By Waldo E. Stephens. New York: Columbia University Press, 1939. pp. xiv, 285. Index. \$3.00.

For a time the League of Nations gave many cause to hope that it would reduce the danger of war by providing agencies and procedures for peaceful change, notably through the revision of treaties. This book, both scholarly

United States Agent before such a tribunal to apply to a United States District Court for subpoenas.

and timely, examines the effectiveness of such agencies and procedures, with particular reference to the Treaty of Versailles. "Among all the articles of the Treaty of Versailles which contemplate a variety of changes to be affected (*sic*) in the peace settlement there is not a single provision which purports to confer upon a contracting State a legal right to free itself from its treaty commitments or to require a revision of the terms of the agreement." So concludes the author, maintaining that the question of treaty revision was so tied up with considerations of national security that the Allied Powers could not bring themselves to accept a definite commitment to revise the treaty at a later date. Furthermore, he adds, the victors were extremely cautious in adopting any measures which might compromise their position of advantage. In fact, the most important revisions, for example those relating to reparations (Part VIII), were effected by new agreements outside treaty provisions and without the authorization of any treaty clause. The author fails to point out, however, whether in these respects the Peace Treaties of 1920 differed from any earlier treaty which put an end to a war.

First of all, the writer determines the nature and scope of the treaty provisions designed to permit some change in the agreement, and the extent to which Germany or the other contracting parties could participate in carrying out the arrangements. Then he analyzes post-war negotiations to determine the types of new adjustments which have been made, either through the facilities provided in the treaty or by the negotiation of fresh agreements apart from treaty authorization. While subscribing to the more limited use of the term "treaty revision", the author has presented materials included in the analysis primarily as an account of the practice of states in preparing a peace treaty at the close of a protracted war, in accepting arrangements for modifying their contractual relations, and in seeking new settlements outside the scope of the treaty terms.

Now that all thinking men are pondering upon the kind of world which must be constructed at the end of the present conflict, it is fortunate that such a study should appear to reveal the elements of strength and weakness in the experiment which the Treaty of Versailles brought into being. It may aid in the solution of one of the most baffling problems of international organization, namely, how to render it possible for a contracting party, for cause and through regular legal channels, to effect the modification of treaty provisions which are inequitable or which constitute a grave danger to the maintenance of peace.

JOHN B. WHITTON

Luis M. Drago, Discursos y Escritos. Compilados y precedidos de una introducción por su hijo Mariano J. Drago. Buenos Aires: Editorial "El Ateneo," 1938. 3 vols.

When Great Britain, Germany and Italy resorted to blockade, bombardment and territorial occupation of Venezuela in order to coerce recognition of certain claims and payment of debts owed by that republic to subjects of

the above-named monarchies, a new doctrine was born in international law. The doctrine was elaborated by Luis M. Drago, Minister of Foreign Affairs of the Argentine Republic, in the form of a communication addressed by him to the Argentine Minister in Washington, December 29, 1902. As enunciated by Dr. Drago, his doctrine was "that the public debt cannot give rise to armed intervention and much less to the physical occupation of the territory of American nations by a European Power." The doctrine was subsequently discussed at the Third Pan American Conference held in 1906 at Rio de Janeiro, which recommended its consideration by the Second Peace Conference at The Hague in 1907. After interesting debates at the Peace Conference, the formula proposed by General Horatio Porter, delegate of the United States, was finally agreed upon and the principle originally conceived by Dr. Drago as a political doctrine restricted to the American continent, became a juridical doctrine of universal application, as embodied in the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, signed at The Hague October 18, 1907. It is noteworthy that the convention was signed by all of the blockading Powers and ratified by two—Great Britain and Germany; but Argentina and nine other American Republics have never ratified it, while of the total of seventeen American signatories or adherents, eleven made very substantial reservations. Nevertheless, the Drago Doctrine has taken deep roots in the international conscience and its essential soundness is universally admitted. In fact it is a corollary to the principle of the juridical equality of states, and it is interesting to point out that after the World War the three blockading Powers of 1902 became also defaulters of their public debts.

The publication of the three volumes of speeches and writings of Dr. Drago is of general interest, because he was, besides an eminent statesman and jurist, an elegant cultivator of the *belles-lettres* and a forceful orator. For the student of international affairs the second volume is of special interest, for it contains valuable (and hitherto partly unpublished) material relative to the origin, exposition and understanding of the Drago Doctrine, on which there is such an extensive bibliography; its discussion at The Hague Conference; and the Argentine position there regarding obligatory arbitration, the International Prize Court and the delivery to belligerents of warships under construction in a neutral country. The documents also deal with the question of the most-favored-nation clause in commercial treaties, and virtually the second half of the book refers to the North Atlantic Fisheries Arbitration between the United States and Great Britain. In this memorable case Dr. Drago was one of the five judges who constituted the tribunal set up by the Permanent Court of International Arbitration at The Hague. When the award was given by the court, Dr. Drago wrote a strong dissenting opinion on Question V of the *compromis*, relative to the method of measuring the three marine miles of territorial waters in the case of bays and harbors, a point on which the award itself admitted that the answer was

"not entirely satisfactory" and that "it leaves room for doubts and differences in practice." The compilation is preceded by a well-written biographical sketch of the celebrated Argentine statesman.

RICARDO J. ALFARO

Giurisprudenza Comparata di Diritto Internazionale Privato. Rassegne di Giurisprudenza: Vol. III, Italia, Canada, Belgio, pp. vi, 378; Vol. IV, Danzica, Austria, Paesi Bassi, Gran Bretagna, pp. viii, 398. Rome: Istituto di Studi Legislativi, 1938. Indices. L. 180 each.

These two volumes are the 1938 contributions in the field of comparative conflict of laws by the Institute of Legislative Studies of Rome. In the first volume may be found the outstanding decisions of Italy, Canada and Belgium during the years 1933-36; in the second, those of Danzig (1933-37), Austria (1933-35), Holland (1933-35), and Great Britain (1932-34). The part devoted to Italian law consists of a large number of decisions with extensive notes and a still larger number of cases with briefer annotations. The signed notes are by one French, one German, and seven Italian professors. The Canadian cases, fourteen in number, and reported substantially in full, were selected by Dean Falconbridge of Osgoode Hall Law School, Toronto. They contain elaborate notes—five of them by Dr. Eckstein of Berlin, two by Professor Cansacchi of Italy, and the rest by Dean Falconbridge. The law of Belgium appears in headnote form, briefly annotated by Professor van Houck of Brussels, and in five instances more extensively by Professor Cansacchi. The law of Danzig was contributed by Dr. Crusen, former president of the Supreme Court of the Free City of Danzig, that of Austria by Professor Satter of Vienna, and that of Holland by Professor van Brakel of the University of Utrecht. The law of Great Britain occupies the larger portion of Volume IV. It is of interest to note that the selection of cases was made by two German scholars living in the United States, and that the notes were written by American, German, French, and Italian scholars. The cases for 1932 were selected by Professor Rheinstein. The shorter notes apparently were written by Professor Rheinstein, and the signed notes by Phanor J. Eder, of the New York Bar, by Professor Morrison, of Tulane University Law School, and by Professor Makarov and Dr. Eckstein, of Berlin. The cases for 1933-34 were selected by Dr. Magdalene Schoch, of Cambridge, Massachusetts, and annotated by her, with the exception of four notes written by Professor Cansacchi. Three notes on the Italian law were written by French and German scholars, and thirteen notes on Canadian and Belgian law, by German and Italian scholars. The Italian, Canadian, Belgian, and British decisions are frequently, if not invariably, set forth in extenso in their original language, whereas those of the other countries are briefly restated in Italian. Two of the notes on the Italian law are in French. All save four of the notes on Canadian law are in Italian, generally with brief summaries of the notes in Italian, English, French and German.

Of the more extensive notes on the British law, four are printed in English, four in Italian, one in French and 23 in German, with brief summaries of the notes in Italian, English, French, and German.

This constitutes truly a cosmopolitan treatment of the conflict of laws. Why it should have been found advisable to print in Italian most of the notes on Canadian law originally written in English, and inadvisable to follow the same course with respect to the notes on the British cases, does not appear. The fact that the great majority of the important notes, even with respect to Anglo-American decisions, are printed either in Italian or German deprives these volumes of much of their value in this country. This is a matter of sincere regret in view of the high quality of the notes and the large variety of subjects dealt with. The notes on Canadian law include capacity to sue and to contract, conditional sales, boundary line between obligations and property rights, adoption, bankruptcy, assignment of contracts, jurisdiction to annul marriage, the qualification of rights, gold clauses, enforcement of foreign judgments, effect of consent upon the jurisdiction of courts, foreign wrongful death, payment of money to domiciliary guardian of a minor or to the domiciliary curator of a lunatic. Those on the law of Great Britain relate, among others, to divorce, custody, distinction between movables and immovables, currency, foreign corporations, autonomy, admiralty, substance and procedure, agency, wills, arbitration, legitimation, confiscatory legislation, and penal laws.

To the reader knowing French, German, and Italian, these volumes constitute a most interesting and useful contribution to the comparative study of the conflict of laws.

E. G. LORENZEN

International Relations. By Bertram W. Maxwell. New York: Thomas Y. Crowell Co., 1939. pp. x, 663. Bibliographies and index. \$3.75.

Unhappy is the author who publishes a general work on international affairs on the eve of an international cataclysm. Professor Maxwell, of Washburn College, went to press with this latest text in August, 1939. In his final chapter, *Peace or War?*, he anticipates Armageddon, but the question mark had already become unnecessary when the work came from the printers. Apart from the inevitable difficulties and limitations imposed by this circumstance (which incidentally also affects the latest edition of *The Great Powers in World Politics* by Simonds and Emeny), Professor Maxwell has made a worthy contribution to the growing list of works designed for one-year college courses in international relations. An introductory survey of diplomatic practices and international organization is followed by competent chapters on nationalism, imperialism, economic nationalism, minorities, and militarism.

Part III, *The Reconstruction Period*, consists of two chapters on Versailles, Locarno, the Pact of Paris, and disarmament. Part IV, *Realities of World Politics*, includes ten regional chapters dealing with each of the six

Western Powers; with the Baltic, the Danube, and the Balkans; with Spain; with the Orient; and with Latin America. An appendix of documents contains the League Covenant, the French-Soviet pact of 1935, the anti-Comintern pact, the Ciano-Perth accord, the Munich agreements, the original British guarantees to Poland, Greece, and Rumania, Roosevelt's peace appeal of April 15, 1939, and the Italian-German alliance.

On the debit side, the work has no systematic treatment of international law. It lacks adequate presentation of Japanese foreign policy. There are, moreover, only five maps of which three are in the distorting Mercator's projection. On the credit side, Professor Maxwell has written a succinct and well-ordered text, reflecting much labor and thought and infused with the only faith which offers hope of escape from world anarchy: faith in international collaboration for the organization of order and the enforcement of law. Whether that faith has a future now depends upon the god of battles.

FREDERICK L. SCHUMAN

The War Behind the War 1914-1918. By Frank P. Chambers. New York: Harcourt, Brace & Co., 1939. pp. xvi, 620. Index. \$3.75.

In this "History of the Political and Civilian Fronts," published on the eve of the second World War, Mr. Chambers, of Montreal, has retold the tale of the first World War in terms of domestic politics, economic planning, civilian morale and public opinion. The "real War," he believes, was less a military conflict than "a struggle between moral and economic forces" on the home front. This war has nowhere been described within the compass of a single volume. The scope of such an enterprise is such that the author makes no claim to meticulous authority in any one field nor to complete coverage of all fields. But he has produced a scholarly, illuminating, and highly readable survey. His material is organized by countries. It is fairly well documented. There are five maps; a bibliography; indices of persons, places, and subjects; and a table of British and French ministries. The accounts of internal developments in Russia and Germany are particularly good. The entire work is well balanced and singularly free from any attempts at indictment or apology.

Most readers of the JOURNAL will regret that Mr. Chambers deals with war propaganda in a fashion which he admits is "perfunctory." They will also regret that the diplomatic aspects of the conflict are not explored in more detail, and that occasional looseness of language diminishes the value of the all-too-few pages devoted to the legal problems raised by hostilities. Yet in evaluating so admirable and comprehensive a work as this it would be unseemly to quibble over questions of emphasis. More serious is a certain diffuseness of treatment flowing from the author's failure to relate his narrative to the "military" war. He does not neglect the fronts. But he ignores the organic connection between "front" and "rear." In war the problem of power is paramount. All action or inaction at home has significance only

as it affects national capacity for attack and defense. Mr. Chambers deals with many of the determinants of war potentials. But the causal nexus between the course of the fighting and the sequence of events behind the lines is not set forth. And for lack of insight here the book lacks the unity and integration which such a *leit motif* would give to it.

FREDERICK L. SCHUMAN

Grundzüge der juristischen Methodenlehre. By Arthur Baumgarten. Berne: Hans Huber, 1939. pp. 192. Sw. Fr. 8.50.

This new and very interesting book of the well-known Swiss scholar is a juridical methodology, based on his philosophy of law. The first part treats the general problems of the conception of law, its interpretation, and the finding of the "correct" law; the second deals with the special methodological problems of constitutional, administrative, private, criminal and international law. But the book is not a doctrine of juridical technique, but a methodology *de lege ferenda*—and this is a very different thing; it deals, not with problems of the science of law, but with problems of the politics of law, of the science of legislation.

The author starts from the philosophical conviction that it is the destiny of mankind to form, in the course of time, a great community of free and equal beings for greater and greater achievements in all the domains of civilization and culture. He interprets the present epoch as an era of profound crisis, the meaning of which may be expressed in terms of a transition from extreme individualism to more social and collectivistic ethics; he feels that a radical change of society is imminent. The world-shaking events of the last 25 years have created a completely new situation for jurisprudence which, therefore, needs a new basis. This new basis the author tries to outline in the political wish of furthering the above-mentioned destiny of mankind by protecting democracy and democratic law against the menace of a new barbarism.

Law, according to the author, is a positive, valid and effective order of human coexistence, based on organized force. Law is not ethics, but has an inherent tendency toward an ethical goal. The materialistic conception of law as a mere superstructure of economics, as a mere instrument of power in the hands of the economically ruling class, the author tells us, is exaggerated and one-sided, but contains, nevertheless, part of the truth. Law is born by idealistic forces—justice, social solidarity—but is also, to a certain extent, what the Marxists claim it to be exclusively.

The author's ideas may, in this JOURNAL, be exemplified by his attitude toward international law and its science. International law is for the author still "amorphous," "fragmentary," not so much a law as a "becoming law" (*ein im Werden begriffenes Recht*). It has no legislation, no compulsory courts, no strong execution; its validity is, therefore, problematic; it can provide no effective rules and methods of peaceful change; and is, for all

these reasons, unable to guarantee peace. The present-day political conception of sovereignty makes real international law almost impossible. Post-war international law has immensely disappointed. But the post-war science of international law has done better, especially if one always has in mind that the international lawyer, worthy of this name, has today, in an age of supra-nationalism, a dangerous position in many countries and may be exposed to the annihilating suspicion of treasonable thinking. But the theoretical investigations of the really important international lawyers have given us, for the first time, an insight into the quintessence of international law and have made us understand that real progress is possible only through a very radical change of our whole society; and nobody can say whether the nations are willing and able to make the sacrifices involved in such radical change.

For—and this is the red (be it said without *jeu de mot*) thread going through the whole book—the principal problem of today is whether the private capitalistic economy should be replaced by a socialistic, planned state economy. International law can only become a reality if mankind is organized into a great, coöperative community of free and equal beings; and this is out of the question “as long as private capitalism, this hothouse of egotism and of suppression of men by men, continues to exist” (p. 116). Class struggle, the author tells us, is the necessary and unavoidable consequence of private capitalism under whatever form of government. And, therefore, all the states, whether democracies or dictatorships, whether “haves” or “have nots,” whether “peace-loving” or “aggressors,” need, in order to counteract this class struggle within and to guarantee the integration of their states, nationalism and war as the only means of integration. And in an international society of sovereign states, which, by the very nature of their internal structure, are forced to rely on nationalism and war, a real international law is impossible.

Whether you agree with the author's ideas or not, the book certainly is a challenge, by posing problems toward which every lawyer and every international lawyer must take a stand.

JOSEF L. KUNZ

Der Kampf um die Völkerordnung. By Hans K. E. L. Keller. (Berlin: Franz Vahlen, 1939. pp. 299. Rm. 10.)

Katholische Solidarität und Volksgemeinschaft. By Anton Baehr. (Berlin-Wien: Deutscher Rechtsverlag, 1939. pp. 283. Rm. 7.80.)

Grundfragen Europäischer Ordnung. By Georg Hahn. (*Ibid.*, 1939. pp. 208. Rm. 7.20.)

Völkerrechtliche Grossraumordnung. By Carl Schmitt. (*Ibid.*, 1939. pp. 88.)

To organize the world as a whole is an idea which has a long history, an idea which led in 1919 to the creation of the League of Nations, an idea which inspires Soviet Russia today as well as the Fascist Powers. But

nearly all practical achievements as well as proposals have been made from the standpoint and for the benefit of a particular nation. Contrary to the League and Russia's "new international law" through world revolution, the "dynamic" nations think rather in terms of regionalism. So the Japanese speak of the establishment of "a new order in the Far East" and Germany's ambition is to set up "a new order in Europe." As all the four above-named books virtually deal with the last-named subject, as they are all written by German authors and based on a religious acceptance of National Socialist ideology, it will be convenient to treat them in one and the same review.

National Socialist ideology, based on "blood and soil," must necessarily and with inevitable logical consequence lead, not only to a battle against "political Catholicism," but to a definitive rejection of Christianity in any form. This is the subject of the book by Baehr. His work is based on a thorough study of the sources and all relevant writings (the bibliography fills 40 pages), and his mere analysis of, for instance, St. Augustine or St. Thomas is very good. But in his fight against Catholic dogmatism, he overlooks with utmost naïveté that he is held in the bonds of the greatest dogmatism imaginable. His prophets are Nietzsche, H. St. Chamberlain, Rosenberg and the official National Socialist ideology. He has only utter contempt for Christianity as "the morale of slaves"; he tells us, that, even more than Jewish Marxism, it was Christianity, revealed to the Jewish race for the rest of the world in the Roman Church, that was the disaster of the Germanic peoples. Christianity has brought the unholy dualism of the State and Church and introduced into the unity of the pure Germanic race the "raceless" and "race-alien" spirit of the Church. The Church is historically nothing but the political order of the "race chaos" of declining antiquity. Only National Socialism has finally made an end to the dualism of State and Church by its conception of the people as the "totality of the racial community."

It follows that neither the State, nor the Church can be essential factors in an international order, but only the "race-conscious people." This is the guiding star of the book, edited by Keller, the founder of the so-called "International of Nationalists." The book contains the Reports of the National Committees of the Academy for the Rights of Peoples as well as of the Research Committees of the Academy. Scotland and the Ukraine are separately listed. Some things make ironical reading. A Rumanian Nationalist tells us that Greater Rumania is "the ripe fruit of the discovery of the Rumanian people as a racial unity." The Munich peace, says a Canadian German, is the first peace on a "people's" foundation. A Flemish Nationalist states in English: "As communism would be the end of our race and civilization, we must all be grateful to the German Leader for having saved Germany and the rest of Europe from that danger." On p. 95 Hitler's word is quoted, that after many wars Poland always remained Poland. Jurisprudence is characterized by Keller as a "total lack of ideas,"

whereas he abounds in ideas. He has, therefore, taken definitive leave from the present international law. The State is a thing of the past; his new international law cannot be anything else but the relations between race-conscious peoples. He is a bitter enemy, in consequence, of the melting-pot ideology of the United States which leads to a "raceless mass of average persons." His new international law not only legitimatizes the policy of *faits accomplis*, but makes it a duty. Only "creative application of force, leading to the victory of the right of peoples, is a source of law" (p. 203).

Hahn, on the other hand, writing on "a new European order," works with the usual methods of the international lawyer. He treats in his first part the contribution of National Socialism to this new European order. The greatest contribution, according to him, is the discernment that "all human life is subordinated to the law of blood" (p. 19). Europe can only be a community of its peoples, understood as blood communities. The community of fate of Europe is founded in the community of blood, history, economics, and present-day problems: creation of a just European order through final liquidation of the Non-Peace of Versailles, common battle against bolshevism, and separation of Jewry as race-alien to Europe. He also takes a strong stand against the State: only the people's communities can be the subjects of international law. The second part, based on all the relevant literature, deals with German foreign policy as a confirmation of the National Socialist idea of a European order. First the battle for German equality; then Germany's contributions to the peace of Europe: Pact of Amity between Germany and Poland, "which has brought the fulfillment of good-neighborly relations between these peoples"—"one of the proudest successes of German foreign policy"; German-British Naval Accord, a "consequence of common blood"; Rome-Berlin axis; Anti-Comintern Pact against Jewish-Asiatic bolshevism; Munich Accord: German-British and German-French declarations; minorities agreements with Czechoslovakia and Poland. No violence, the author tells us, must be done against foreign peoples, no imperialism. It is not possible to create a new order in Europe by force (p. 55). If Germany stands internally against bolshevism, it cannot be its friend externally (p. 30). "It is impossible for the Leader suddenly to take an action which would constitute a slap in the face against the principles which he himself has implanted in the people" (p. 54). All very ironical, if read in the light of the Berlin-Moscow axis. This book is good proof of the fact that no scientific study can be achieved simply by rationalizing the ideologies and policies of the day, especially in a period when those policies change rapidly and sometimes are completely reversed, not, as the author naively believes, under the impact of ideologies, but of political necessities and interests and for mere considerations of opportunism, as is always the case with the power politics of all the Great Powers.

Very different is the small book by Carl Schmitt. Whereas the others still cling to the "racial community," he thinks in terms of the "German

people's living space." Although paying homage to the "people," he recognizes the necessity of the territorial element in international law. However, this territorial element must no longer be the State, but the "international Grossraum (great space)." He attempts to introduce into international law the conception of the "Grossraum" in the German form of the Reich. The first and most successful application of this principle the author sees in the Monroe Doctrine of 1823, which he contrasts with the British principle of the "security of the life-lines of the Empire," born out of the political necessities of a non-coherent, far-flung Empire. The clash between these two principles in the Panama Canal affair ended with the clear victory of the American Monroe Doctrine. The principle of the "Reiche" presupposes, like the Monroe Doctrine, a particular people, direction against a particular enemy (for political relations, the author long ago taught, are friend-enemy relations), and non-intervention by "space-alien" Powers. "Reiche," therefore, are the leading Powers whose political conception of life extends into a certain "great space," excluding from this space intervention by "space-alien" Powers, the "great-space orders," whose guardians and guarantors are a people able to fulfill such task. In other words: Britain and France have nothing to do in Central and Eastern Europe.

Carl Schmitt, professor of law, has, of course, never been a jurist, but a politician; and, from his point of view, this is by no means a reproach but a compliment. This book is, therefore, not a study in international law, but a political thing. The author has great knowledge and has done vast reading; he is full of wit, abundant in new ways of looking at well-known topics. Regardless of whether you agree with his ideas or not, you will find the reading of this book a pleasure, for the author has talent and brains.

JOSEF L. KUNZ

BRIEFER NOTICES

De Internationale Arbitrages van Nederland van 1813 tot Heden. By G. A. van Hamel. (The Hague: Martinus Nijhoff, 1939. pp. viii, 157. Gld. 2.80.) A decade ago there appeared a study on Netherlands international arbitrations from 1581 to 1794, by E. O. van Boetzelaer. The study was noteworthy, for it indicated that, contrary to general belief, arbitration flourished in this period. In this study Dr. van Hamel completes the work begun by Dr. van Boetzelaer by bringing the analysis of Netherlands arbitrations up to the present. Ten cases of arbitration in which The Netherlands was a party are analyzed, beginning with the dispute with France over the interest on the Netherlands public debt, 1815-1816, and ending with the difference with the United States over the sovereignty of the Island of Palmas. Van Hamel concludes that arbitration cannot be entirely advantageously replaced by the jurisdiction of the Permanent Court of International Justice, not only because not all states are members of the court, but also for the reason that, as illustrated in the Palmas Island Case, an arbitration tribunal can follow a procedure which the Permanent Court of International Justice cannot follow, but whose use nevertheless may serve the interests of the parties to the dispute.

A. VANDENBOSCH

Diplomacy. By Harold Nicholson. (New York: Harcourt, Brace & Co., 1939. pp. 264. Index. \$2.00.) This brief, somewhat informal, but none-the-less scientific discussion of the problems, aims, and technique of diplomacy, is expressed with the facile charm we so often find in English works. Mr. Nicholson gives us an outline of the special qualifications which a diplomat should possess, and lays particular emphasis upon truthfulness, popular opinion to the contrary notwithstanding. Other qualities are precision, calm, patience, modesty, and loyalty. He takes for granted intelligence, knowledge, discernment, prudence, hospitality, charm, industry, and tact. He indicates a whole series of distinct and sometimes opposing loyalties with which the diplomat must try to keep faith. The author is keenly alive to the modifications which modern inventions and changed political and social conditions have imposed upon diplomacy. He notes the importance of propaganda and the obligation of diplomacy not only to protect, but also to further the extension of the commercial interests of his country. Especially interesting is Mr. Nicholson's formulation of the foreign policy of Great Britain and the principal continental countries, as determined by geographic considerations. This is a book which everyone interested in world affairs should read.

ELLERY C. STOWELL

Conferencias Internacionales Americanas, 1889-1936. (Washington: Carnegie Endowment for International Peace, 1938. pp. lviii, 746. Index. \$4.00.) In 1931, the Carnegie Endowment for International Peace published in English a collection of the conventions, recommendations and resolutions adopted at the first six International Conferences of the American States (1889-1928) and the documents relating to the organization of the conferences. In the seven years which transpired prior to the Lima Conference of 1938, two further Pan American conferences had taken place, the Seventh International Conference of American States held at Montevideo in 1933, and the Inter-American Conference for the Maintenance of Peace, held at Buenos Aires in 1936. The present publication in Spanish includes not only all of the documents contained in the English edition of 1931, but also the documents of the two later conferences. It was published at a most opportune time as it served to place in the hands of the Spanish-speaking delegates to the Eighth International Conference of American States, held at Lima in December, 1938, all these highly relevant documents. The publication has a short preface by Dr. Leo Rowe, Director of the Pan American Union, and an introduction by Dr. James Brown Scott, Director of the Endowment's Division of International Law. The book contains an ample index both of persons and subject-matter. The volume will be of great value not only to Latin American readers but also to those who prefer to cite an English text, the Spanish text being now readily at hand for comparison. In some instances, as in the case of the Final Act of the Sixth Conference (Habana, 1928), the Spanish text alone was signed by the delegates.

ARTHUR K. KUHN

The White Book. Published by the Ministry of Foreign Affairs of Guatemala, with the subtitle *Controversy between Guatemala and Great Britain Relative to the Convention of 1859 on Territorial Matters. Belize Question* (Guatemala: Tipografia Nacional, 1938. pp. 503. Index), is an impressive collection of material from the Guatemalan archives relating to a boundary controversy which goes back to the 17th century. Originally

settled by buccaneers, who cut log wood as a side-line when piracy was too dangerous or unprofitable, Belize was gradually transformed into a British colony despite the opposition of Spain and later of Guatemala. The process was much the same as that which barely failed to achieve a similar result in the Bay Islands and the Mosquito Coast. The present dispute relates to the boundary agreed upon in 1859 in a treaty which also provided that Great Britain should coöperate with Guatemala in establishing communication by road or river between the Atlantic coast and the Guatemalan capital. The indefinite character of this latter undertaking led to a prolonged dispute which was never settled, and which was revived in 1933 when the British Government proposed to undertake a unilateral survey of the boundary. Guatemala insisted on her right to compensation for concessions made in the 1859 treaty and suggested that her claims be arbitrated by the President of the United States. The British Government made a counter-proposal that the case should be submitted to the Permanent Court at The Hague. When Guatemala rejected this, negotiations were broken off. The White Book contains the correspondence exchanged between the two governments in the period before and after the signature of the 1859 treaty, as well as that of the past six years, and also gives an historical summary and other material which will be useful to the student of Caribbean affairs. D. G. MUNRO

Diplomatic Correspondence of the United States. Inter-American Affairs, 1831-1860. Selected and arranged by William R. Manning. Vol. XI: *Spain*. (Washington: Carnegie Endowment for International Peace, 1939. pp. xlv, 1017. Index. \$5.00.) It would be supererogatory to restate the importance of the series of which this is the eleventh volume, or to praise again the high standard of editorial effectiveness which Dr. Manning has maintained throughout his exacting labors. This volume, with a subtitle "Spain," covering the years 1831 to 1860, embraces the archival materials in the Department of State having to do primarily with Cuba. In it will be found the correspondence concerning such important matters as the *Black Warrior* case, the early filibustering expeditions, and the various schemes for the annexation of Cuba by the United States, including the Ostend Manifesto. Documents as to the last give a picture of the ebullient Soulé. But other matters in addition to Cuban affairs receive attention; for instance, the Declaration of Paris and the repercussions in Spain of the annexation of Texas and of the Mexican War. J. S. REEVES

Diritto Internazionale, 1938. Published by the Istituto per Gli Studi di Politica Internazionale. (Milan: Amedeo Nicola & C., 1939. pp. xx, 567. L. 120.) The second volume, covering the year 1938, of this very useful annual publication (*cf.* review in this JOURNAL, July, 1939, pp. 613-614) follows the example of the first volume as to the system adopted for the distribution of materials in the different parts. The diplomatic documents in the second part are more fully reproduced. The judgments of Italian courts in cases of conflict of laws cover this time an entire year (July 1937-June 1938). The new Italian Code on the Laws of War and Neutrality is fully reprinted in the original. Among the original articles of the first part we mention Venturini's study (pp. 74-82) on the "Protectorate of Bohemia-Moravia" and R. de Nova's detailed analysis (pp. 17-52) of the American Neutrality Act of 1937. JOSEF L. KUNZ

Appunti sui Concetti di "Civiltà" e di "Nazioni Civili" nel Diritto Internazionale. By Matteo Declewa. (Trieste: University of Trieste, 1937. pp. 41. L. 7.) Some eleven years ago, this reviewer, in a monograph, the first on this subject, showed that "civilized nations," as a legal technical term in international law, means nothing else but states, members of the international community. Starting from this study, the Italian author agrees with this reviewer as to this identity, but with one restriction, namely, that in recent times positive international law has recognized within the international community a more restricted community of "civilized nations." But the author has failed to prove this hypothesis—he calls it himself only a hypothesis—and was bound to fail, as such a more restricted community with special international rights and duties is unknown to positive international law. The author's hypothesis owes its birth entirely to the political desire of legally justifying Italy's attitude toward Ethiopia. The author cannot deny that Ethiopia, at least after her admission to the League, was a member of the international community, but he seeks to show that she was not a member of this new legal élite of "civilized nations." Now, whether a state is a civilized nation in an extra-legal sense—that is to say, reaching the level, historically speaking, of European Christian States—and whether, therefore, it is worthy of membership in the international community, is a question to be determined at the time of its admission. And it is well known that Great Britain, for that reason, opposed the admission of Ethiopia, and that it was exactly Italy which secured this admission by insisting that she is a civilized nation.

JOSEF L. KUNZ

The Residence and Domicil of Corporations. By A. Farnsworth. (London: Butterworth & Co., 1939. pp. xxxviii, 370. Index. 21s.) As Lord McMillan says in his foreword to Mr. Farnsworth's very readable treatise on the residence and domicil of corporations, "Nowhere else is the whole learning on the subject to be found so exhaustively set out and so critically analyzed." Being an official of the United Kingdom Inland Revenue Department, the author dwells particularly upon court decisions in income tax matters, which first assumed that a corporation could only have one residence, namely, the place of central control and management, but later held that a corporation, like an individual, could be resident in more than one country, and further, that the mere fact of incorporation in the United Kingdom under the Companies Acts does not itself make a corporation resident there. The author discusses fully the British jurisprudence on the residence and domicil of individuals and shows the extent to which attempts to draw analogies for artificial persons have led to errors. The criteria for determining the nationality of a corporation, particularly during war, and for fixing its commercial domicil, are of timely interest, and a helpful review is given of American law and doctrine on the whole subject. The book contains an extensive table of cases.

MITCHELL B. CARROLL

Nationalboykott und Völkerrecht. By G. A. Walz. (Berlin: Duncker & Humblot, 1939. pp. vi, 118. Rm. 9.60.) The core of this monograph by one of National Socialist Germany's best-known writers on international law comprehensively investigates the international legality of, and state responsibility for, national boycotts. An analysis of the different kinds of boycotts precedes the main section, and a review of the salient literature follows it. The author finds himself in substantial agreement with E. M.

Borchard, and particularly John Bassett Moore, and criticizes adversely Lauterpacht and Hyde. *Inter alia* he concludes, first, that "any national boycott supported or furthered by a government or its organs in peace-time is recognized as contrary to international law and entails complete state responsibility," and second, that "in the interest of candor and clear responsibility" any private national boycott "must be condemned by international law" mainly because "it can attain real effectiveness only with the benevolent furthering or indulgence of the government or its organs." Although not entirely free from National Socialist phraseology, the author's consistent reasoning on the basis of his pluralistic theory, his thorough documentation, and the presentation of conflicting viewpoints make the monograph of use to all students concerned with national boycotts. RALF F. W. MUNSTER

Financial Questions in United States Foreign Policy. By James W. Gantenbein. (New York: Columbia University Press, 1939. pp. xvi, 264. Index. \$3.25.) In recent years financial questions have assumed increasing importance in international relations. Among such questions the author has selected for study those with which the United States has been chiefly concerned. The matters dealt with comprise: foreign exchange instability, exchange control, intergovernmental debts, defaults on foreign dollar bonds, international double taxation, and the promotion of foreign trade through governmental credit facilities. The omission of such live issues as those arising out of the expropriation of foreign properties of American nationals or out of the government's silver purchase program is justified on the ground that where they are essentially financial in character they do not appear to belong primarily to the field of foreign relations and *vice versa*. Devoting a separate chapter to each of the problems considered, the author in each instance traces the main developments, discusses briefly the policy of the United States Government, and concludes with a convenient summary. The book should be of interest to the general reader desiring a readable and compact survey of these problems, while it might also provide useful supplementary reading assignments in connection with university courses in international finance. The work, however, rarely rises above the elementary textbook level so that it is not likely to make much appeal to the specialist in the field. The author is an officer in the United States Foreign Service, but he warns his readers that the statements and views contained in the book are entirely unofficial in nature. W. H. WYNNE

Die Kartellbindung bei internationalen Kartellen. By Günter Hofheinz. (Heidelberg: Carl Winter's Universitätsbuchhandlung, 1939. pp. viii, 109. Rm. 6.) This discussion of the cartel system consists of two parts. The two chapters of the first part describe the basic economic and legal concepts summarizing the German struggle in respect to monopoly tendencies, the good and bad cartels in France, the English concept of restraint of trade, and cartels under the American anti-trust laws. The second part deals with the practicable legal regulation as related to the different types of cartels. Although the economic need has developed, no body of international cartel regulation has evolved. The book is replete with notes to authorities in the field. It is a stimulating discussion of the impact of international economic trends upon varying national juridical concepts.

HOWARD S. LEROY

Die Holding-Gesellschaft nach den Rechten der internationalen Zone von Tanger, der Republik Panama und des britischen Dominiums Canada. By Heinrich Rheinstrom. (New York and Zürich: Verlag Oprecht, 1939. pp. 94.) This is volume two of international comparative law studies on the holding corporation published by Dr. Rheinstrom. The treatment consists of a preamble and three parts. Each part discusses the holding corporation in one of the states in the title, with Canada receiving more than half of the discussion. The nineteen-page preface covers general considerations as related to definition, nationality and the legal forms of the holding corporation. The specific treatment by countries follows a similar analysis. Emphasis is also placed on the national tax policies as applied to the holding corporation in each country. The book should be of special interest to those engaged in the study of the comparative law evolution of the holding corporation.

HOWARD S. LEROY

Illusions et Réalités dans la Politique Internationale de Paix. By Heinz Lunau. (Paris: Boccard, 1939. pp. 183. Index. Fr. 35.) This is a study by a young German who has found it convenient to carry on his research outside of his native country because he was deprived of his citizenship. The author undertakes to demonstrate that some aspects of traditional juridical thought have a harmful effect upon the international life of peoples. He pleads for reason in international relations and sets out to "demonstrate that the '*malaise européen*' which causes the peoples to suffer under the curse of wars and preparations for war consists precisely in the predominance of certain conceptions of international law, developed and spread by representatives of this science which are false from the scientific point of view . . ." (p. 24). What is now imperatively needed is to "break the predominance of concepts by which jurists '*vieillis sous le harnais de la routine*' have attained a sort of absolute autocracy . . ." (p. 156). A political system truly international must be inaugurated. Up to now the Geneva system has only been a continuation of national foreign policy and no international political system has yet been attained. The essence of Mr. Lunau's study may be summarized as a plea for a new adaptation of the concept of national sovereignty to meet present-day economic and social needs on an international scale. It is remarkable that he confines his constructive proposals to a center for study by scholars and experts, and to replace "*l'épave de Genève*" with a universal center for reasonable conversations (*Centre Universel de Conversations raisonnables*). A bolder and more sweeping proposal could be expected on the basis of his premises. The real international order for which he, and all of us hope, can only be attained by implementing national coöperative action in some form of permanent international organization. This is the way to "avoid war and construct peace," the supreme task of which he writes.

J. EUGENE HARLEY

World Federation. By Oscar Newfang. Translated into French by Pierre Gault. (New York: Barnes & Noble, 1939. English text, pp. xi, 118; French text, pp. xii, 122.) This book, in both English and French within the same covers, is another plea for the federation of the nations. The author presents a study of the actual achievement of peace within the national areas of Great Britain, Italy, France, and Germany, where peace has been assured because in every case there is an effective authority throughout and a free movement of goods, money and persons. From analogy the author argues for an effective world authority capable of "enforcing its

laws and decisions by an effective force." Treaties, international law, economic conferences, he finds, are futile, and war conditions follow because of the lack of political unity. He would have the Assembly of the League of Nations develop into a world legislature, the Permanent Court of International Justice into a World Supreme Court with compulsory jurisdiction in all international disputes. Then, bravely, he would have the Council developed into a World Executive Cabinet "provided with unchallengeable military, naval and air forces," in order to enforce the peaceful acceptance of the laws of the World Legislature and the "decisions of the World Supreme Court." The author is not scared by such difficulties as transferring armed power from the member states to the World Federation, and tries to show how that could be done. In some detail he outlines the powers implied in a federal world. He sees the necessity for an independent, direct power of taxation, the payment of the federal forces by the central authority, the federal control of a world monetary system, and the establishment of a régime of economic freedom. As a piece of political interpretation this work shows little rootage in relevant realities of history compared, say, with Streit's *Union Now*. But, like Streit, he has apparently overlooked certain views of such men as James Wilson, George Mason, Oliver Ellsworth, James Madison, who faced his problem in 1787 and directed its solution to the enduring satisfaction unto this day of 48 free, sovereign, independent states. It would be well if our prophets moved to write of international federalism could begin by learning why Alexander Hamilton looked upon any such scheme embodying a force for the coercion of states as "one of the maddest projects that was ever devised."

ARTHUR D. CALL

Coöperation as a Way of Peace. By James Peter Warbasse. (New York and London: Harper & Bros., 1939. pp. xvi, 111. Index. \$1.00.) Mr. Warbasse develops the thesis that in the principles and methods of consumers' coöperatives may be found a solution of the problem of world peace. He stresses the facts that these organizations are democratic in their control; that their membership is voluntary and unlimited; that they observe neutrality in respect to class, political, and religious issues; and that they follow a policy of expansion and federation. Since they are non-profit-making and non-competitive in purpose, the coöperatives further economic stability and peace wherever they operate. Through the International Coöperative Alliance they serve as a constructive influence in international relations. The author looks forward to the time when such private unions will be strong enough to rid the world of power politics as now practiced by "political" governments.

S. D. MYRES, JR.

Swords and Symbols: The Technique of Sovereignty. By James Marshall. (New York, London, Toronto: Oxford University Press, 1939. pp. viii, 168. Index. \$2.00.) The subject of sovereignty, reaching down as it does to the very basis on which law and government rest, seems to have a fascination for lawyers of philosophic bent. The problem has become more and more complicated with the growth of modern democratic government, and we are all constantly challenged to determine what particular force or forces constitute the last word in the authority of the state. Mr. Marshall, a practising attorney, and now President of the New York City Board of Education, draws a distinction between the conflicting interests in the state, marking off certain interests which may be included in the sovereign group, and others that are excluded, but are fighting for recognition. This

leads him to an analysis of the "Weapons of Sovereignty," some of which involve the use of force or the threat of force, while others are of an economic and propagandist character. Separate chapters deal with the principal weapons and slogans, such as Law, Freedom, Sovereignty and Unity. Mr. Marshall finds that "The essence of democracy is equality" and not the representative or parliamentary form of government. "Democracy", he holds, "requires such a balance among the holders of the political weapons of force and of wealth as will enable freedom of expression to exist." Democracy therefore is only "formalized equality"; and its success depends upon a wide distribution among the body politic of the sources of power. There are many keen observations in the volume, but the recondite style in which it is written sometimes serves to obscure rather than clarify the writer's thought.

Contemporary World Politics. Edited by Francis J. Brown, Charles Hodges, and Joseph S. Roucek. (New York: John Wiley & Sons, 1939. pp. xiv, 718. Index. \$4.00.) This is a successful attempt to meet what the editors describe as the need for a work outlining "the fundamentals of international politics" and giving "an introduction to the factors which underlie the swiftly moving events on the world stage." In doing so the editors have called upon a group of some 35 specialists, each one of whom is an expert in his particular field. Unity of presentation is obtained not only by having the separate contributions directed towards a common aim, but by adding a series of introductory statements and concluding summaries prepared by the editors. Part I, "World Conflict," surveys the general issues, nationalism, power politics and imperialism that lead to war. Part II, "Major Foreign Policies," takes the leading nations by turn and examines the bases of their foreign policies. Part III, "Regional Interests," sets forth the problems of Latin America, the Baltic, the Balkans, and the Near East. Part IV, "World Organization," contains, among other chapters, a study of international law, the League of Nations, the Permanent Court and the International Labor Organization. Part V, "Making World Opinion," deals with the problem of the press, propaganda and moral disarmament. Part VI, "Roads to World Peace," analyzes the several forces making for and against peace and discusses the problem of popular education in world affairs. Many distinguished names appear in the list of contributors. Occasionally the contributors present, as in the case of Professors Quincy Wright and Edwin Borchard in dealing with world organization, conflicting points of view. But these have the advantage of giving to the reader a broader understanding of the problem. Professor Hodges contributes a number of pictorial maps which help the student to visualize the problems discussed in the text. On the whole, the material in the volume is so well selected and coördinated that it should continue to be useful in spite of the rapidity with which the international scene is changing—perhaps even more useful for that very reason. C. G. FENWICK

Economic Aspects of the Monroe Doctrine. By Thomas Harrison Reynolds. (Nashville: George Peabody College for Teachers, 1938. pp. viii, 194.) This unbound monograph of nine chapters, in a field so frequently explored by earlier historical investigators, was prepared as a doctoral thesis at a teachers' college and published as a "contribution to education." It is based chiefly upon published documents and secondary works. In justification of the volume the author mentions the emphasis which he has placed

upon the economic thread as an important factor in diplomacy and his method of approach from the Spanish-American point of view. After tracing economic interests of the United States in its early policy concerning the Mississippi Valley and the Floridas, and in connection with the independence movement in Hispanic America which paved the way for the enunciation of the defensive formula of the Monroe Doctrine, he indicates that the original doctrine of Monroe, which had evolved from commercial and economic facts, was later transformed into an aggressive imperialistic policy by vague or new interpretations or applications based upon new and widening American economic interests in two continents. He suggests that future economic interests might be served best by reinterpretation or clarification of the original doctrine. The monograph is equipped with footnotes and an incomplete bibliography, but it has no index. J. M. CALLAHAN

America and the World Crisis. Edited by S. D. Myres, Jr. (Dallas: The Arnold Foundation, Southern Methodist University, 1939. pp. xiv, 187.) This volume is a record of the Sixth Annual Conference of the Institute of Public Affairs held in March, 1939, at Southern Methodist University. The Institute was founded in 1934, and the volumes since 1935 have dealt with *The Cotton Crisis* (1935), *The Southwest in International Affairs* (1936), *International Institutions and World Peace* (1937), and *Mexico and the United States* (1938). Dr. Myres, Director of the Arnold School of Government, has given outstanding service in organizing this regional institute which includes the metropolitan areas of Dallas, Fort Worth and Waco. The following educational institutions participated actively in the Institute: Southern Methodist University, Texas Christian University, Trinity University, Texas State College for Women, Baylor University, and the Hockaday Junior College. The fourteen papers included in this volume are: European Tensions, Fascism and International Peace, Chamberlain's Appeasement at Munich, The Role of International Law, The Press and the Crisis, Essentials of Our Foreign Policy, Some Constructive Suggestions, Economic Bases of Peace, Anglo-Saxon Hegemony, The Good-Neighbor Policy, America's Position in the Caribbean, The Far Eastern Problem, Party Politics and American Foreign Policy, and Restoring Congressional Government. This volume indicates in the addresses printed the wide range of American foreign policy and the close relationship of the United States to a world in crisis. CHARLES W. PIPKIN

Government in Republican China. By Paul Myron Anthony Linebarger. (New York and London: McGraw-Hill Book Co., 1938. pp. xvi, 203. Index. \$1.50.) This is a scholarly, thoughtful and well-written book. It deserves a better, or, at least, a more descriptive title. Only a bare dozen pages are devoted to outlining the structure of the present government of China. The remainder of the book deals with the historical, political and ideological factors which serve to explain the present constitutional situation in China. This makes the work a much more valuable one than it would have been had its pages been given over to an elaborate and detailed description of the existing organs of government, for there is every likelihood that, after the present Sino-Japanese conflict is ended—however it is ended—very considerable changes in governmental structure will result. When this occurs, Dr. Linebarger's intelligent analysis and evaluation of the dynamic forces in Chinese national life will remain valuable. W. W. WILLOUGHBY

Northeastern Asia. A Selected Bibliography. 2 vols. By Robert J. Kerner. (Berkeley: University of California Press, 1939. Vol. I, pp. xxxix, 675; Vol. II, pp. xxxi, 621. Index. \$26.00.) Some five years ago certain professors in the departments of History and Oriental Languages in the University of California organized a seminar for the study of Northeastern Asia, particularly of the relations between China, Russia and Japan. As a result we are presented with these two large volumes containing a selected bibliography of works in Chinese, Japanese, Russian and other languages, dealing with the problems growing out of these relations. There are 13,884 titles listed, giving to interested students invaluable assistance in their search for source materials. Such a large number of works upon a subject of somewhat limited concern inclines one to echo the sentiment of Ecclesiastes: "Of making many books there is no end." If in the second century B.C., long before the invention of printing, one could utter that sentiment with pertinency, how much more appropriate it is today! This work, moreover, is produced by photolithographic process, of which even Solomon, with all his wisdom, knew nothing. In the list there are a few works, which, in the opinion of the reviewer, are of slight value. There are others whose authors are well-known propagandists. Their statements require careful scrutiny. But, on the whole, the list is an excellent one, and Dr. Kerner deserves the gratitude of all students of Far Eastern affairs for his ungrudging devotion to a task tedious and difficult in the extreme. The work is divided into four parts: (1) Asia, the Far East . . . the Pacific, (2) China, (3) The Japanese Empire, and (4) The Russian Empire and the Soviet Union. In each of these divisions the literature is classified as it relates to bibliography, geography, history, international relations, economic conditions and other subjects. The table of contents is very full and, with the aid of the subject index and the numerous cross-references, one can quite easily find the works that will supply the information which he seeks. The volumes are substantially bound and are a credit to the University Press.

E. T. WILLIAMS

Problems of Peace and War. Grotius Society Transactions. (Vol. 23, 1937, pp. xxiv, 219; Vol. 24, 1938, pp. 1, 202. London: Sweet & Maxwell. 10 s. each.) In this collection of papers read in 1937, Dr. Joost A. van Hamel warns against relying "too much on . . . human intelligence . . . in trying to organize . . . the international life of States. . . . Attempts at useful federation have only succeeded when some responsible machinery or authority had been set up . . . not dependent on the individualistic views of the separate members." Dr. L. P. Jacks discusses "The Frailty of Alliances" as "more precarious and exposed to infraction than legal contracts between individuals," which are supported by "the law of the land to enforce" penalties, and cites the Covenant of the League of Nations as "the most solemn and elaborate treaty ever made"; but none of the parties to it "deposited any security for the fulfillment of its obligations, though many of them had a bad record in the matter of treaty-keeping." Judge Mégalos Caloyanni raises several questions under "The Organization of International Justice," including "Should the Permanent Court of International Justice . . . [deal] also with political disputes?"; "Can the Court in justiciable cases give a judgment only on points absolutely of law?"; "Should an International Equity Court be established?" He presents pro and con arguments without offering definitive answers.

"Some Legal Aspects of the Mandate System" are clearly displayed by James C. Hales in the form of divergent opinions of courts and commissions which seem to conclude that sovereignty over mandates "is not vested in anyone," and that "the right to exercise the powers of a sovereignty is subject to treaty restrictions." Other papers are: "Some Features of Hungarian Private International Law," "International Loans and the Conflict of Laws," "An American Challenge to International Anarchy," and "Recognition of Belligerency and Grant of Belligerent Rights," which are not herein summarized only because of limitations of space.

During 1938 nine papers were read before the Society, of which the titles of "International Commercial Arbitration," "Unification of the Law of Commercial Arbitration," "Some International Aspects in Relation to Matrimonial Causes," "The Status of French Women in France," "The Extraterritorial Effect of Some Foreign Marriage Prohibitions," "The Rights of Man," and "Idealism in International Law" can be only mentioned here. Dr. Paul Weiden inquires into "Necessity in International Law," reminding us of the assertion of "a genuine right" by Grotius, Wolff, and Vattel; distinction between dire and relative necessity by Pufendorf; Martens' association of "self-preservation" with necessity; the "right" which arises in the opinion of Fiori when "the State cannot protect its natural sphere" in any other way; and Phillimore's dictum that "a clear necessity is a sufficient justification for everything done under it fairly with good faith." The opposition of Westlake, Oppenheim, Cavaglieri, Hautefeuille, Pradier-Fodéré and others is cited, and the conclusion is reached that, although the existence of a right of necessity has been recognized by the governments of the United States, Great Britain, Germany, Russia and Japan, "the fact that a possible divergence between the strict law and the requirements of a national emergency has been fully considered by International Law ought . . . to restrain statesmen from using illegitimately the argument of necessity." Francis Temple Grey argues that "while the definition of aggression is for a legislature, the identification of the aggressor is for a tribunal"; further, that "Treaties are contracts . . . [and] not law." He illustrates his view with "instruments which pass for and are called International Law," *i.e.*, Article 16 of the Covenant of the League of Nations, and the Briand-Kellogg Pact, in both of which he finds vagueness and demands more precision as to what the terms used mean, and if "aggression" and "aggressor" cannot be defined, they should not be used. Discussions such as these are stimulating and fruitful, and worthy of publication and distribution.

WILSON LEON GODSHALL

Deutsches Internationales Privatrecht. Vol. II. By Leo Raape. (Berlin: Franz Vahlen, 1938. pp. x, 141-397. Rm. 8.) The first volume dealt with what is frequently styled the "general part" of the conflict of laws. The present volume contains the "special part"—family law, law of inheritance, law of obligations, law of property, and other absolute rights, such as copyright, patent law, and industrial property. Whereas the discussion of the "general part" did not make an altogether favorable impression upon the reviewer,¹ it is clear now that a different reaction would have been created had the complete work been published at the outset. The treatment of the subject, so far as the "special part" is concerned, is of such a highly meritorious character as to overshadow any defects noted in the "general part."

¹ See this JOURNAL, Vol. 33 (1939), p. 427.

In the brief compass of about 250 pages we find here a most satisfactory discussion of the German rules of the conflict of laws in their relation to the manifold questions arising in this field. The author presents, with respect to all leading questions, the attitude of the courts, especially of the Supreme Court. He likewise indicates also his own views, and frequently those of other German writers. Where the German law stands out by way of contrast with Anglo-American, French, or Swiss law, such difference is briefly noted. At every turn apt examples are given indicating how the problem ought to be solved, the facts having reference to a great variety of countries. The author finds it possible to deal not only with the general principles applicable in the law of family, inheritance, succession, and property—of great interest is his discussion of the law governing contracts—but also with specific phases of each subject. For example, in the matter of contracts, he discusses at length the statute of limitations, agency, assignment, attachment and counterclaims, special attention being given to various currency problems. In the field of property considerable space is devoted to *res in transitu* and instruments payable to bearer. The fact that Raape is the leading writer on the conflict of laws still remaining in Germany—Frankenstein, Gutzwiller, Lewald, Nussbaum, Rabel, and Wolff having left the country—gives to the statements contained in the work the stamp of authority.

Die deutsche Devisengesetzgebung im internationalen Privatrecht. By Klaus Koepfel. (Berlin: Junker & Dünnhaupt, 1938. pp. 157. Rm. 6.80.) This monograph forms part of a series edited by Professor Eduard Wahl under the title of *Neue Deutsche Forschungen—Abteilung Bürgerliches Recht, Handels- und Wirtschaftsrecht*. It deals with the German currency restrictions in private international law. The German legislation provides that the currency restrictions shall be applicable without reference to nationality and domicile, but to foreign transactions only in so far as they are governed by German law. This leaves many problems to be answered by the courts. Although a good deal has been written on the subject by German and foreign writers, the present monograph constitutes a valuable contribution to the literature on currency restrictions. It not only discusses the questions from the standpoint of the German conflict of laws, but shows also the attitude taken with reference to the German legislation by the courts of foreign countries, such as Austria, England, France, Holland, Norway, Switzerland, and the United States. Of the various views that have been expressed regarding the nature and effect of the German currency restrictions, the Supreme Court of Germany has adopted that of impossibility of performance, according to which the contractual relations between the parties are not deemed altered, but performance by the debtor rendered impossible. The defense of impossibility of performance has been disallowed, practically without exception, by the courts of all foreign countries before which the question has come, the public policy exception in the conflict of laws being mainly relied upon. Generally speaking, the law governing the performance of a contract controls also in the matter of impossibility of performance. This rule is set aside, however, on grounds of public policy where strong interests are opposed. As restrictive currency legislation such as the German is enacted for the promotion of the economic interests of the country in question and at the expense of other countries, it is natural that the latter should strike back by way of self-defense and deny validity to such legislation. Emergency legislation, applicable to both domestic and foreign creditors is one thing, and currency legislation directed exclusively against foreign debtors quite an-

other. No fault can be found, therefore, with the refusal of foreign courts to recognize such legislation on grounds of public policy. The operation of the rules of the conflict of laws may appear at their worst in the matter of currency restrictions, but this is unavoidable as long as the nations of the world show such a lack of coöperation along economic lines as they do at the present time.

E. G. LORENZEN

BOOKS RECEIVED *

- Akzin, Benjamin. *The Palestine Mandate in Practice*. (Iowa Law Review, Vol. 25, No. 1.) November, 1939. pp. 45.
- Amery, L. S. *The German Colonial Claim*. London and Edinburgh: W. & R. Chambers, 1939. pp. 199. Index. 7s. 6d.
- Bello Codesido, Emilio. *El Arbitraje y la Equidad*. Puntos de Derecho Internacional expuestos por el autor, como miembro del Tribunal Especial de Límites, que funcionó en Washington a virtud del Tratado de Arbitraje celebrado por las Repúblicas de Guatemala y Honduras, el 16 de Julio de 1930. Santiago: Imp. El Imparcial, 1939. pp. 87.
- Beneš, Eduard, Arthur Feiler, Rushton Coulborn. *International Security*. Edited by Walter H. C. Laves. Chicago: University of Chicago Press, 1939. pp. xii, 153. Index. \$2.00.
- Benson, Oliver. *Through the Diplomatic Looking-Glass. Immediate Origins of the War in Europe*. Norman: University of Oklahoma Press, 1939. pp. x, 239. Index. \$2.00.
- Bisson, T. A. *American Policy in the Far East: 1931-1940*. New York: Institute of Pacific Relations, 1939. pp. x, 146. Index. \$1.25.
- Bloch, Kurt. *German Interests and Policies in the Far East*. New York: Institute of Pacific Relations, 1939. pp. xii, 75. Index. \$.75.
- Bullock, A. L. C. *Germany's Colonial Demands*. Edited from the reports of the Oxford University British Commonwealth Group. With a concluding chapter by Vincent Harlow. New York: Oxford University Press; London: Humphrey Milford, 1939. pp. x, 214. \$2.75.
- Dawes, Charles G. *Journal as Ambassador to Great Britain*. Foreword by Herbert Hoover. New York: Macmillan Co., 1939. pp. xii, 442. Index. \$5.00.
- D'Ormesson, Wladimir. *France*. Translated by J. Lewis May. (Ambassadors at Large: Studies in the Foreign Policies of the Leading Powers. Edited by E. H. Carr.) New York, London, Toronto: Longmans, Green & Co., 1939. pp. xviii, 228. \$2.00.
- Dulles, Allen W., and Hamilton Fish Armstrong. *Can America Stay Neutral?* New York and London: Harper & Brothers, 1939. pp. vi, 277. Index. \$2.50.
- Eliot, George Fielding. *Bombs Bursting in Air: The Influence of Air Power on International Relations*. New York: Reynal & Hitchcock, 1939. pp. x, 173. Index. \$1.75.
- Foreign Relations of the United States, 1924. Papers Relating to*. (2 vols.) (Department of State Publications Nos. 1366, 1374.) Washington: Government Printing Office, 1939. Vol. I: pp. cxiv, 780. Index. Vol. II: pp. xciv, 764. Index. \$1.50 each.
- Gregory, Homer E., and Kathleen Barnes. *North Pacific Fisheries*. With special reference to Alaska salmon. New York, San Francisco, Honolulu: American Council, Institute of Pacific Relations, 1939. pp. xviii, 322. Index. \$3.00.
- Harper, Lawrence A. *The English Navigation Laws*. New York: Columbia University Press, 1939. pp. xvi, 503. Index. \$3.75.
- Hill, Norman L., and Harold W. Stoke. *The Background of European Governments*. 2nd ed. New York: Farrar & Rinehart, 1940. pp. xx, 672. Index. \$2.75.
- Hishida, Seiji. *Japan Among the Great Powers*. New York, London, Toronto: Longmans, Green & Co., 1940. pp. xvi, 405. Index. \$3.50.

* Mention here does not preclude a later review.

- Hulen, Bertram D. *Inside the Department of State*. New York and London: Whittlesey House, McGraw-Hill Book Co., 1939. pp. xii, 328. Index. \$3.00.
- International Labor Conference. 26th Session, Geneva, 1940. *Rights of Performers in Broadcasting, Television and the Mechanical Reproduction of Sounds*. Geneva: International Labor Office, 1939. pp. iv, 128.
- Istituto Italiano di Studi Legislativi. *Giurisprudenza Comparata di Diritto Internazionale Privato (Con cenni di Legislazione e di Bibliografia Internazionale)*. Edited by Prof. Salvatore Galgano. Vol. V. *Rassegne di Giurisprudenza: Belgio, Germania, Gran Bretagna, Danzica, Romania*. Rome: Istituto Italiano di Studi Legislativi, 1939. pp. viii, 380. Index. L. 180.
- Jones, S. Shepard, and Denys P. Myers (editors). *Documents on American Foreign Relations, January 1938-June 1939*. Boston: World Peace Foundation, 1939. pp. xxvi, 582. \$3.75.
- Kaltenbach, Frederick W. *Self-Determination, 1919*. A Study in Frontier-Making between Germany and Poland. London: Jarrolds, 1938. pp. 150. Index. 3s. 6d.
- Keeton, George W., and Georg Schwarzenberger. *Making International Law Work*. London: Peace Book Co., 1939. pp. 214.
- League of Nations Library. *War-Time Legislation, 1939. Economic, Financial and Transport Questions*. Bibliography. Geneva: 1939. pp. viii, 51.
- Lockey, Joseph Byrne. *Essays in Pan-Americanism*. Berkeley: University of California Press, 1939. pp. viii, 174. \$2.00.
- Loewenstein, Karl. *Hitler's Germany. The Nazi Background to War*. New York: Macmillan Co., 1939. pp. xvi, 176. \$1.25.
- Milner, Ian F. G. *New Zealand's Interests and Policies in the Far East*. New York: Institute of Pacific Relations, 1939. pp. x, 131. Index. \$1.00.
- Ogg, Frederic Austin. *European Governments and Politics*. 2nd ed. revised. New York: Macmillan Co., 1939. pp. viii, 936. Index. \$4.25.
- Pellizzi, Camillo. *Italy*. With a Foreword by Alberto De' Stefani. (Ambassadors at Large: Studies in the Foreign Policies of the Leading Powers. Edited by E. H. Carr.) New York, London, Toronto: Longmans, Green & Co., 1939. pp. xii, 223. 6s.
- Rafuse, Robert W. *The Extradition of Nationals*. Urbana: University of Illinois Press, 1939. pp. 163. \$1.50.
- Renn, Ludwig. *Warfare: The Relation of War to Society*. Translated by Edward Fitzgerald. New York: Oxford University Press, 1939. pp. 276. Index. \$2.50.
- Robertson, William Spence. *France and Latin-American Independence*. Baltimore: Johns Hopkins Press, 1939. pp. xvi, 626. Index. \$3.75.
- Salter, Sir Arthur. *Security—Can We Retrieve It?* New York: Reynal & Hitchcock, 1939. pp. xvi, 391. Index. \$3.50.
- Sandiford, Roberto. *Diritto Marittimo di Guerra*. 6th ed. Rome: Ministero della Marina, 1940. pp. x, 372. Index. L.20.
- Santoro, Cesare. *Hitler Germany as Seen by a Foreigner*. Third English Edition. Translated from the German. Berlin: Internationaler Verlag, 1939. pp. 488; 96; 13 diagrams.
- Sastry, K. R. R. *Indian States and Responsible Government*. Published by the author. Allahabad University, 1939. pp. 142. 7s. 6d.
- Scott, James Brown. *The Law, the State and the International Community*. (2 vols.) New York: Columbia University Press, 1939. Index. \$8.75.
- Seton-Watson, R. W. *From Munich to Danzig*. 3rd ed. revised and enlarged of *Munich and the Dictators*. London: Methuen & Co., 1939. pp. xiv, 287. Index. 6s.
- Shepherd, Jack. *Australia's Interests and Policies in the Far East*. New York: Institute of Pacific Relations, 1939. pp. xii, 212. Index. \$1.75.
- Spaulding, Oliver L. *Ahriman: A Study in Air Bombardment*. Boston: World Peace Foundation, 1939. pp. xii, 143. Index. \$.50.
- Vela, David. *Nuestro Belice*. Guatemala: Tipografia Nacional, 1939. pp. 195.

- Whittlesey, Derwent. *The Earth and the State. A Study of Political Geography.* New York: Henry Holt & Co., 1939. pp. xviii, 618. Index. \$3.75.
- Wilson, George Grafton. *Handbook of International Law.* 3rd ed. St. Paul: West Publishing Co., 1939. pp. xxiv, 623. Index. \$5.00.
- Wright, Quincy. *The Existing Legal Situation as It Relates to the Conflict in the Far East.* New York: Institute of Pacific Relations. 1939. pp. x, 129. Index. \$1.00.
- Ziegler, Benjamin Munn. *The International Law of John Marshall.* Chapel Hill: University of North Carolina Press, 1939. pp. xiv, 386. Index. \$3.50.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

ACTA SCANDINAVICA JURIS GENTIUM, 1939 (Vol. 10, Nos. 2-3). *The System of Sanctions under the League Covenant and Neutrality* (pp. 83-108), G. Sandberg; *Ideological Neutrality* (pp. 109-117), E. Hambro; *La Réforme de la Société des Nations* (pp. 118-135), A. Moeller.

AMERICAN BAR ASSOCIATION JOURNAL, October, 1939 (Vol. 25, No. 10). *Work of the Mixed Claims Commission* (pp. 845-848), J. C. Fehr.

———, November, 1939 (Vol. 25, No. 11). *War and the Administration of Justice* (pp. 919-922), C. A. Beardsley.

AMERICAN FOREIGN SERVICE JOURNAL, December, 1939 (Vol. 16, No. 12). *The British Commonwealth Goes to War* (pp. 645-648, 692-694), R. B. Stewart; *The Evolution of British Diplomatic Representation in the Middle East* (pp. 655-656, 678-687), J. R. Childs.

AMERICAN POLITICAL SCIENCE REVIEW, October, 1939 (Vol. 33, No. 5). *The International Sugar Régime* (pp. 860-878), K. Wilk.

———, December, 1939 (Vol. 33, No. 6). *The Nature of Nationalism* (pp. 1001-1021), H. Kohn.

ARBITRATION JOURNAL, October, 1939 (Vol. 3, No. 4). *The London Court of Arbitration* (pp. 336-351), L. Macassey; *Unity by Law* (pp. 351-357), W. R. Bisschop.

CONTEMPORARY MANCHURIA, July, 1939 (Vol. 3, No. 3). *A Historical Outline of the Development of Manchurian Railways* (pp. 36-61); *The Truth About the Russian Emigrants in Manchoukuo* (pp. 62-82); *An Outline of Outer Mongolia* (pp. 111-140), K. Ishida.

FOREIGN AFFAIRS, January, 1940 (Vol. 18, No. 2). *Cash and Carry Neutrality* (pp. 179-195), A. W. Dulles; *From Brest-Litovsk to Brest-Litovsk* (pp. 196-210), J. W. Wheeler-Bennett; *The Reality of International Law* (pp. 244-253), P. C. Jessup; *Canada at War* (pp. 292-304), E. P. Dean; *Ireland and the War* (pp. 305-313), S. Gwynn; *Radio, Censorship and Neutrality* (pp. 337-349), C. Saerchinger; *The War in the Air: First Phase* (pp. 357-365), J. M. Spaight.

GEORGETOWN LAW JOURNAL, October, 1939 (Vol. 28, No. 1). *The Conflict of Laws Philosophy of Mr. Justice Holmes* (pp. 1-23).

———, November, 1939 (Vol. 28, No. 2). *The Extent of the Treaty-Making Power* (pp. 184-197), E. R. Feidler and R. H. Dwan.

JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW, November, 1939 (Vol. 21, No. 4). *The Aliens Regulations in France* (pp. 220-229), M. F. P. Herchenroder.

NEW COMMONWEALTH QUARTERLY, September, 1939 (Vol. 5, No. 2). *The League of Nations and Federal Union* (pp. 119-130), C. Eagleton.

NORDISK TIDSSKRIFT FOR INTERNATIONALT RET, 1939 (Vol. 10, Nos. 2-3). *Folkförbundspaktens Sanktionssystem och Neutraliteten* (pp. 81-106), G. Sandberg; *Ideologisk Nøitralitet* (pp. 107-115), E. Hambro; *Politikk og Folkerett* (pp. 116-129), F. Castberg; *Danzig "Korridoren" og Polens Deling m. m.* (pp. 130-141), E. Brüel.

PACIFIC AFFAIRS, December, 1939 (Vol. 12, No. 4). *The Far East and the New Order in Europe* (pp. 357-369), L. K. Rosinger; *The International Position of Netherlands India* (pp. 379-393), G. H. Bousquet; *The Future of Foreign Concessions in China* (pp. 394-399), Toshi Go.

REVISTA DE DERECHO Y CIENCIAS POLÍTICAS, 1939 (Vol. 3, No. 2). *De la Investigación y de la Conciliación en los Tratados Interamericanos* (pp. 247-282), P. M. Oliveira; *Política Exterior Actual de los Estados Unidos* (pp. 395-408), S. F. Bemis.

REVISTA DE DERECHO INTERNACIONAL, September, 1938 (Vol. 34, No. 67). *La Responsabilidad del Estado por daños irrogados a la Persona o a los Bienes de Extranjeros en luchas civiles* (pp. 7-65), L. A. Podestá Costa; *El Parlamento Internacional de la Paz* (pp. 66-80), J. Efremoff; *Comentarios y Sugestiones sobre el Tema 8 de la VIII Conferencia Panamericana*

(pp. 81-138), A. Menéndez y de Armas; *La Raza como Sostén del Estado Moderno* (pp. 139-147), R. Solórzano.

—, March, 1939 (Vol. 35, No. 69). *La Primera Conferencia Americana de Comisiones Nacionales de Cooperación Intelectual* (pp. 49-70), H. Rodríguez y Von Sobotker; *Las Inmunidades de los Funcionarios Diplomáticos y Consulares* (pp. 114-121), R. Seelig Ruibal.

—, June, 1939 (Vol. 35, No. 70). *Significación Internacional de la Conferencia de Lima* (pp. 153-162), R. J. Alfaro; *Estudio Jurídico acerca de la Controversia entre Guatemala y la Gran Bretaña relativa a la Convención de 30 de Abril de 1859 sobre Asuntos Territoriales* (pp. 163-231), L. Anderson; *La Paz Orgánica* (pp. 232-244), P. Martínez Fraga.

REVISTA DE LA FACULTAD DE CIENCIAS JURÍDICAS Y SOCIALES DE GUATEMALA, July-August, 1939 (Vol. 2, No. 3). *La Cuestión de Belice* (pp. 440-453), S. Aguilar.

REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE, 1939 (Vol. 20, No. 2). *Les États-Unis et la Loi de 1935 sur la Contrebande* (pp. 217-255), H. W. Briggs; *La Neutralité et son état d'Évolution Actuelle* (pp. 256-285), C. G. Ténékidès; *Les Réclamations Diplomatiques contre les Soviets (1918-1938)* (pp. 286-322), A. N. Sack; *L'Affaire des Phosphates du Maroc* (pp. 323-338), G. Staedtler; *De l'Existence d'un Troisième Droit Intermédiaire entre le Droit Interne et le Droit International* (pp. 339-410), A. Scrimali.

REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, May-June, 1939 (Vol. 13, No. 3). *La Guerre Civile Espagnole et le Droit des Gens* (pp. 197-228), G. Scelle; *La "Guerre Totale" du Japon en Chine* (pp. 229-303), M. Chrétien.

UNITED STATES LAW REVIEW, August-September, 1939 (Vol. 73, Nos. 8-9). *What of International Law?* (pp. 437-440), R. E. Irston.

WORLD AFFAIRS INTERPRETER, October, 1939 (Vol. 10, No. 3). *War and How It Came upon Europe* (pp. 234-245), A. Th. Polyzoides; *The Background of the Sino-Japanese Conflict* (pp. 246-257), P. H. Lohman.

YALE LAW JOURNAL, November, 1939 (Vol. 49, No. 1). *The Alien and the Public Charge Clauses* (pp. 18-38), L. M. Alpert; *"Mein Kampf" and the Protection of Literary Property of Stateless Persons* (pp. 132-139).

—, December, 1939 (Vol. 49, No. 2). *Extraterritorial Effect of Confiscatory Decrees* (pp. 324-329); *International Arbitration of the Black Tom and Kingsland Cases* (pp. 346-351).

ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT, November, 1939 (Vol. 19, No. 4). *Ideologische Neutralität* (pp. 502-515), E. Hambro; *Begriff und Wirklichkeit der Neutralität* (pp. 516-538), E. H. Bookhoff; *Zur Typenlehre des Volkstumsrechtes* (pp. 539-544), A. Merkl.

ZEITSCHRIFT FÜR VÖLKERRECHT, 1939 (Vol. 23, No. 2). *Neue Grundlagen des Volksgruppenrechtes* (pp. 129-164), G. A. Walz; *Der Chilenisch-Peruanische Auslieferungsvertrag und das Interamerikanische Strafrecht* (pp. 165-177), Th. Schniederkerötter; *Neue Völkerrechtlich Bedeutsame Gesetze in Estland* (pp. 178-188), W. Meder.

ELEANOR H. FINCH

FAR EASTERN POLICIES OF THE UNITED STATES

BY W. W. WILLOUGHBY

*Professor Emeritus of Political Science, Johns Hopkins University; Honorary
Adviser to the Chinese Embassy at Washington*

Whether or not it was possible at the time for those who framed the treaties which terminated the World War of 1914-1918 to have better provided for the years of peace which were to follow, it is now generally recognized that the terms agreed upon by the Allied Powers and imposed upon Germany were not as wise as they might have been. This is a conclusion which experience has demonstrated, and, from this experience, it is proper that nations should derive wisdom with regard to any future treaties of peace which may be entered into. Hence it is that, since the outbreak of the present European war, there has been much discussion as to what terms should be imposed upon Germany if and when she is compelled to sue for peace. Especially is it recognized that, if a stable and satisfactory peace is to be realized, not only must the forces which attack international law and order and morality be decisively checked, but relations between states, economic and commercial as well as political, must be placed upon a basis that will tend to create conditions that will do essential justice to all the peoples concerned; which will be mutually beneficial to all these peoples; and will thus furnish no adequate grounds for future international complaint and conflict. No treaty of peace can furnish a full guarantee that some nation or nations will not be spurred on by considerations of mere prestige, by mystical conceptions of race superiority, or by the baldest of imperialistic designs to break this peace, but, if this occurs, a wise treaty of peace can make clear to all other nations the iniquity of such action and predispose them to united and effective action to meet the situation thus created. In considerable measure, the treaty of peace can definitely provide what shall be done in that eventuality by the nations which desire the maintenance of law and order and justice in the international world. It may be further necessary to place upon a somewhat different basis than has previously obtained the rules which shall govern the rights and responsibilities of nations with regard to the status of aliens and their property and cultural interests residing or existing within their borders, and, of course, correlative to this, a definition of the rights and responsibilities of nations with regard to their own citizens and their interests located abroad. This last undertaking will be a most difficult one. So conflicting are the considerations involved, complete avoidance of opportunities for conflict can hardly be hoped for, but provision can be made for the just and peaceful settlement of these conflicts when they do arise.

The considerations which have been mentioned, which must enter into

the framing of a just and wise European treaty, also apply to the establishment of peace in the Far East.

As it is the primary purpose of this paper to deal with the situation in the Far East as presented by the aggressions of Japan upon China, it becomes pertinent to consider in a specific way what conditions must be created within that vast area if a stable peace is to be established there—one that will be essentially just to all the Powers concerned and mutually beneficial to them all. And, in this connection, it will be necessary, if the inquiry is to take a realistic and practical form, to take into account not only the desires and policies of China but also the probable policies of the other interested Powers. Especially is this necessary with regard to the probable policies of the United States. And here it may be noted that it is certain that American Far Eastern policies will greatly influence, even if they do not wholly control, British policies, for it is known that, as a matter of exigent political expediency, if not wholly a matter of agreement as to political outlook and immediate interests, the British Government is, and will continue to be, anxious to maintain harmonious and coöperative relations with the United States. In truth, it is the writer's opinion that the British and American Governments are, and will continue to be, in agreement as to what is essential to the establishment of a satisfactory situation in the Far East, although it is possible that they may not always agree as to the exact steps to be taken to create that situation, and it may be that, at times, when there is full agreement as to these steps, Great Britain may find it impractical to join in taking them because of immediate requirements growing out of the present war in Europe.

It is furthermore to be noted that there is every likelihood that France and other nations like Holland, Belgium and Portugal will be largely controlled in their Far Eastern policies by those adopted by Great Britain and the United States. Furthermore, it is certain that China herself will be greatly influenced by American policy and opinion as to what may be considered a satisfactory solution of her present national and international problems. It is not to be expected that China will, at the instance of the United States, make any concessions which will violate or infringe upon rights and interests which she deems essential to her as a sovereign and independent state or which she is convinced will operate to threaten the continuance of such sovereignty and independence; but, as the writer expects to show in the paragraphs which follow, it is not at all likely that the United States will wish China to make any such concessions.

In result, then, it appears that the Far Eastern policies of the United States will be largely decisive as to what will be the policies of the other Powers with Far Eastern interests, and highly influential upon the policies of China herself. Thus, an examination of what are likely to be the Far Eastern policies of the United States involves a general discussion of the Far Eastern international problem.

It is not always, perhaps only seldom, that one is able to predict with confidence what are to be international policies of a given state, but, in the present case, not only have the American people made known in an indubitable and almost unanimous manner their general attitude toward the Chinese-Japanese conflict, but the American Government, by its official declarations and acts, has placed upon record its views with regard to the attempts of Japan to change the *status quo* in the Far East as established by the Washington Nine Power Treaty of 1922. In order to make plain this declared policy of the American Government it will be appropriate to list the specific declarations which have been made. These declarations have been made upon numerous occasions, but are to be found especially in the communications to Japan of October 6¹ and December 31, 1938.² However, the most comprehensive statement by the United States of its views regarding the purpose and scope of the Nine Power Treaty is that given in the letter of February 23, 1932, of Mr. Stimson, Secretary of State, to Senator Borah, then Chairman of the Committee on Foreign Relations of the United States Senate.³

The positions taken by the United States may be summarized and listed as follows:

1. The claim by the Japanese that a "new order" exists or is coming into existence in the Far East, to which treaties of the past are not to be held necessarily applicable, is definitely repudiated. In its communication to Japan of December 31, 1938, the American Government declared:

This Government is well aware that the situation [in the Far East] has changed. This Government is also well aware that many of the changes have been brought about by action of Japan. This Government does not admit, however, that there is need or warrant for any one Power to take upon itself to prescribe what shall be the terms and conditions of a "new order" in areas not under its sovereignty and to constitute itself the repository of authority and the agent of destiny in regard thereto.

It is significant that, in its note of about the same date, namely, of January 14, 1939,⁴ the British Government communicated to Japan a very similar statement. That note contained the following declaration:

His Majesty's Government desire to make it clear that they are not prepared to accept or to recognize changes of the nature indicated [by Japan] which are brought about by force. They intend to adhere to the principles of the Nine Power Treaty, and cannot agree to the unilateral modification of its terms. . . . His Majesty's Government therefore cannot agree, as suggested by Japan, that the Treaty is obsolete or that its provisions no longer meet the situation, except

¹ Note of Oct. 6, 1938. Dept. of State Press Releases, Oct. 29, 1938, Vol. 19, pp. 283-286.

² Note of Dec. 31, 1938. *Ibid.*, Dec. 31, 1938, Vol. 19, pp. 490-493.

³ Dept. of State Publication No. 296.

⁴ London Times, Jan. 16, 1939, p. 11; New York Times, Jan. 16, 1939, p. 7.

in so far as the situation has been altered by Japan in contravention of its terms.

2. As appears from the above, the United States has unequivocally declared that Japan will be held bound by its commitments made in the Nine Power Treaty.⁵

As regards the purpose and scope of the treaty, Secretary Stimson, in his letter to Senator Borah, declared:

It must be remembered also that this treaty was one of several treaties and agreements entered into at the Washington Conference by the various Powers concerned, all of which were interrelated and interdependent. No one of these treaties can be disregarded without disturbing the general understanding and equilibrium which were intended to be accomplished and effected by the group of agreements arrived at in their entirety. . . . The willingness of the American Government to surrender its then commanding lead in battleship construction, and leave its positions at Guam and in the Philippines without further fortification, was predicated upon, among other things, the self-denying covenants contained in the Nine Power Treaty which assured the nations of the world not only of equal opportunity for their Eastern trade but also against the military aggrandizement of any other Power at the expense of China.

It clearly appears that the declaration that has just been quoted was intended to operate as a warning to Japan as to the broad implications which the American Government would feel itself free to ascribe to a repudiation by Japan of her Nine Power Treaty commitments.

3. The American Government has declared that it continues to attach value and force to the Kellogg-Briand Peace Pact of 1928—a pact which, it will be remembered, was signed by nearly all the nations of the world, including Japan, and under which the signatory Powers agreed that “the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.” As evidencing the fact of the force and value attached to the Peace Pact, the United States has several times called its existence to the attention of contesting Powers in the Far East, and, in the Stimson-Borah letter, the following language was used:

Six years later the policy of self-denial against aggression by a stronger against a weaker Power, upon which the Nine Power Treaty had been based, received a powerful reinforcement by the execution by substantially all the nations of the world of the Pact of Paris, the so-called Kellogg-Briand Pact. These two treaties represent independent but

That is, until that treaty is amended or replaced by another treaty in accordance with the orderly processes prescribed by international law for the creation or amendment of international agreements. Both the United States, in its note of Dec. 31, 1933, and Great Britain, in its note of Jan. 14, 1939, declared to Japan that they did not regard treaties as necessarily eternal, and that they were prepared to consider any such changes in the Nine Power Treaty as existing facts might make desirable, but that such changes could rightfully be made only by orderly processes and agreement among the parties thereto.

harmonious steps for the purpose of aligning the conscience and public opinion of the world in favor of a system of orderly development by the law of nations including the settlement of all controversies by methods of justice and peace instead of by arbitrary force. The program for the protection of China from outside aggression is an essential part of any such development.

4. The American Government has declared in so many words that Japan, by her aggressions upon China, has violated her engagements contained in the Nine Power Treaty and the Peace Pact. This has also been the position taken by nearly all the other nations of the world, as represented especially in the resolutions adopted by the Assembly of the League of Nations.

5. The United States Government has repeatedly stated its view that the Open Door doctrine is the most beneficial one that can be applied to trade and commerce in the Far East, and has repeatedly declared its intention to abide by that doctrine and to insist that the parties signatory to the Nine Power Treaty do the same. So numerous have been these statements that it is not necessary to select any one of them for quotation.

6. That the United States, as a signatory to the Nine Power Treaty, considers itself obligated "to respect the sovereignty, the independence, and the territorial and administrative integrity of China," goes without saying. The United States has also, upon numerous occasions, declared that this respect is an integral part of the Open Door doctrine. Thus, to give but a single instance, the United States in its note of December 31, 1938, to Japan, spoke of the two principles as correlative, and declared that, as a matter of experience, it had been demonstrated that impairment of a nation's integrity is almost inevitably followed by disregard of the Open Door as applied to that nation. "Whenever any Government begins to exercise political authority in areas beyond the limits of its lawful jurisdiction," the note declared, "there develops inevitably a situation in which the nationals of that Government demand, and are accorded, at the hands of their Government, preferred treatment, whereupon equality of opportunity ceases to exist and discriminatory practices, productive of friction, prevail."

It will be noted that the parties signatory to the Nine Power Treaty have not undertaken, individually or collectively, to guarantee the sovereignty and territorial and administrative integrity of China. They have agreed no more than to respect this sovereignty and integrity. Thus, the engagement is different, for example, from that embodied in Article Ten of the Covenant of the League of Nations according to which the members of the League have pledged themselves "to respect and preserve as against external aggression the territorial integrity and existing independence of all the members of the League." Therefore, while it can be said that the members of the League have not, as regards their member, China, fulfilled the undertaking assumed by themselves, the same is not true of the United States which is not, and never has been, a member of the League. However, inasmuch

as the Nine Power Treaty is in the nature of a common declared policy with regard to China and is, in essence, an assurance given to China in return for various undertakings upon her part, it would seem that, at least morally, and perhaps legally, an obligation rests upon the signatories to see to it that the main purpose of the declared policy, namely, the sovereignty and territorial and administrative integrity of China, is not defeated, and especially not by one of their number. The expression "perhaps legally" is here used because it has never been certainly determined—indeed, the writer has not seen it carefully discussed—whether the rights and obligations accruing from the Nine Power Treaty are, in part or wholly, to be deemed joint or several or both joint and several. Whatever may be the final determination as to this, one cannot escape the conviction that the treaty lays upon each of its signatories a moral obligation of a high character not to give aid to a signatory engaged in violating the sovereignty and territorial and administrative integrity of China if, by any legal action upon its own part, it can escape from doing so. And, of course, there is no question but that any of the signatories has a right, under the treaty, to protest to, and to take any action it may see fit against, any one of the co-signatories which acts in violation of the undertakings it has given to each one and all of the signatories.

The foregoing observations have a direct bearing upon the question whether the parties signatory to the Nine Power Treaty have carried out in full measure their obligations under the treaty in so far as they have permitted a violator of the treaty to import from their ports materials for certain and necessary use in carrying out its aggressions upon China.

7. The United States has declared in unqualified terms that it will not give legal recognition, so far as its own treaty rights or those of its nationals in China are concerned, to any *de facto* situation—a very broad term—which is created by a violation of the sovereignty, the independence, or the territorial and administrative integrity of China. In still broader terms, the United States has made the same declaration with reference to violations of the Peace Pact of 1928. In its note of January 7, 1932,⁶ the terms of which have not been modified by any later statement, the United States Government declared:

In view of the present situation [created by the military occupation by Japan of the Manchurian provinces of China] and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of

⁶ Dept. of State Press Releases, Jan. 9, 1932, pp. 41-42.

China, or to the international policy relative to China, commonly known as the Open Door policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States are parties.

It is well known that this doctrine or policy of non-recognition was accepted and declared by the members of the League of Nations (except Japan) and embodied in the Report of the Assembly of the League on the Sino-Japanese Dispute, adopted on February 24, 1933. In that report it is declared with reference to the then existing régime in Manchuria: "They [the member states of the League] will continue not to recognize this régime either *de jure* or *de facto*."

Later, the League, through an Advisory Committee which it established, sought to give effective implementation to this declaration by outlining the various actions which it would be appropriate for the member states to do or not to do with relation to the unrecognized state of Manchukuo.⁷

Whatever may have been the actual results thus far obtained from the Stimson and League doctrine of non-recognition, the doctrine has an important significance with reference to the sort of peace in the Far East with which the United States can be expected to be contented, for it is to be noted that the doctrine was declared by the United States in a manner that did not limit it in point of time, and, since its declaration, the United States has not, in any way, modified or weakened its stand upon this point. In this respect, the policy of President Roosevelt during his two terms of office has not differed from that of his predecessor, President Hoover. It may also be observed that, by official acceptances of the doctrine by other states and in still more general terms, there is support for those who hold that the doctrine has been received into the general *corpus* or body of accepted international law as a proper mode or means for discouraging the violation by states of their treaty and other international law obligations: in other words—to use a term of municipal law—as a sanction.⁸

In view, then, of the fact that the United States has undertaken in a most explicit manner to refuse to recognize that a legal status can be changed by illegal means, it is clear that not only is it in the highest degree unlikely that the United States will bring influence to bear upon China to persuade her to accept conditions of peace with Japan which will represent gains obtained by Japan as the result of violations by her of the Nine Power Treaty or of the Peace Pact, but that the United States will refuse to accept as binding upon herself any agreements which China, acting upon her own part, may feel herself

⁷ This JOURNAL, Supplement, Vol. 27 (1933), p. 119, at p. 151. For details as to this, see the author's *The Sino-Japanese Controversy and the League of Nations*, p. 520 ff.

⁸ Black, in his *Law Dictionary*, defines a sanction as "a penalty or punishment provided as a means of enforcing obedience to a law."

compelled to make with Japan which may be deemed by the United States to be inconsistent with her own rights as embodied in her treaties with either China or Japan, or, for that matter, in violation of the Peace Pact of 1928. In short, if the United States continues to adhere to the non-recognition doctrine, as it is to be assumed she will do, China may expect support from the United States if she insists upon an effective reestablishment of the *status quo* as envisaged and provided for in 1922 by the Nine Power Treaty. It would seem that practically all the other nations which approved the League Assembly Report of 1933 will find it difficult to escape giving to China the same support, and especially is this true of Great Britain, which, as shown by the quotation earlier made from her note of January 14, 1939, has made her position in this respect so clear. What specific form, substantial or merely moral or negative, this support may take, it is impossible to foresee, for in international relations, as well as in other domains of human interests, practical exigencies have their influence upon the actions taken.

The foregoing paragraphs have made plain the extent to which the United States has stated in official form its views with regard to the maintenance and establishment in the Far East of a situation which will satisfy American treaty rights and provide for legitimate American commercial and other interests in China. This exposition makes evident that, happily for the two countries, there is no conflict between their rights or interests and that, therefore, there is not likely to be any serious divergencies in their policies.

From this exposition, it further appears that the Chinese, in defending their own national rights have, in fact, been also defending American rights and interests. This, the writer believes, is recognized by at least the informed and thinking people of the United States. More than this, they appreciate that, in the long and valiant struggle the Chinese have been waging against their Japanese invaders, the Chinese have been resisting forces which threaten world order and even civilization itself. As to this, the writer ventures to repeat the closing words used by him in an article published in 1937:

In conclusion, then, let this be said: While China is struggling to preserve her own national life she is also, as it happens, resisting the advance of forces which, if unchecked, threaten the continued existence of factors essential to the maintenance of international law and order. If such an international régime cannot be maintained, the existence of civilization itself will be threatened. The issues at stake in the Far East are thus world-wide in their significance and portentous in their possible results.⁹

That the American Government, as well as the American people, appreciates and is influenced by this deeper and broader issue of the Far Eastern conflict, is certain. As evidence of this may be quoted the following from a

⁹ The Significance to the World of the Conflict in the Far East. Published by the Chinese Cultural Society, New York City.

letter of January 8, 1938,¹⁰ by Secretary of State Hull to the Senate of the United States in response to a request from that body for information regarding the number of Americans residing in China, and the amount of American capital invested in China. After giving the information asked for, Secretary Hull felt himself obligated to add:

The interest and concern of the United States in the Far Eastern situation, and in situations on this continent are not measured by the number of American citizens residing in a particular country at a particular moment nor by the amount of investment of American citizens there nor by the volume of trade. There is a broader and more fundamental interest—which is that orderly processes in international relationships be maintained. Referring expressly to the situation in the Far East, an area which contains approximately half the population of the world, the United States is deeply interested in supporting by peaceful means influences contributing to preservation and encouragement of orderly processes. This interest far transcends in importance the value of American trade with China or American investments in China; it transcends even the question of safeguarding the immediate welfare of American citizens in China.

In numerous of his public addresses and other utterances, Secretary of State Hull has emphasized the concern with which the American people view the attacks that are being made upon international law and order and morality as exemplified in the acts of Japan and certain of the European nations. President Roosevelt has also given repeated expression to this same concern. In his speech in Chicago on October 5, 1937, he said:

There can be no stability or peace either within nations or between nations except under laws and moral standards adhered to by all. International anarchy destroys every foundation for peace. It jeopardizes either the immediate or the future security of every nation, large or small. It is, therefore, a matter of vital interest and concern to the people of the United States that the sanctity of international treaties and the maintenance of international morality be restored.

Finally, with regard to this matter of American material interests in the Far Eastern conflict, reinforced as it is by the American appreciation of the deeper and more fundamental issues involved and their general feeling of friendship for the Chinese people, and sympathy for them because of the unmerited sufferings to which they are being subjected, there is added the high indignation of the American people against the Japanese because of the cruel and inhuman manner in which the Japanese have been carrying on their war against the Chinese people. Especially have the Americans been revolted by the bombing by the Japanese of cities and towns without military significance and the resulting killing or maiming of thousands of Chinese non-combatants, including many women and children. Ambassador Grew, in his outspoken address on October 19, 1939, at Tokyo,¹¹ before the American-

¹⁰ Dept. of State Press Releases, Jan. 15, 1938, Vol. 18, pp. 100-105.

¹¹ Dept. of State Bulletin, Nov. 11, 1939, Vol. I, pp. 509-516.

Japanese Society, referred to this general indignation when he informed his Japanese hearers that the American people had been "profoundly shocked over the widespread use of bombing in China." He might also have added that the American people had been shocked by the extent to which the Japanese military and aviation forces had selected Chinese educational and other cultural establishments for destruction.

This matter of the general opinion of the American people as distinguished from, but harmonious with, the official utterances of their government is dwelt upon in this paper because in the United States public opinion, more than in most countries, determines the foreign policies of the government. The significance of this fact was pointed out to the Japanese, undoubtedly as a warning, in the address of Ambassador Grew to which reference has just been made. After pointing out the opportunity which he had recently had to learn public opinion in America, he said:

When public opinion is unanimous, or nearly unanimous, then governmental policy and action must and will reflect the opinion and wishes of the people as a whole. For the American Government is the servant of the American people. American public opinion with regard to recent and current developments in the Far East is very nearly unanimous, and that opinion is based not on mere hearsay or on propaganda but on facts.

Later in his speech Ambassador Grew deemed it expedient again to warn his Japanese hearers as to the intimate relation in the United States between public opinion and government policies. He said: "When such opinion tends toward unanimity in any given issue, it is a force to be reckoned with, a force which the Government cannot possibly overlook and will not fail to reflect in its policies and actions."

It scarcely needs to be pointed out that what Ambassador Grew said in his speech must have had the full approval of the authorities at Washington.

Thus far, in this paper, only the declarations of principles and policies by the American Government with reference to the Far East have been dealt with. It remains to consider what action this Government has taken in pursuance of these declarations.

In the first place, the United States Government has given financial aid to China. This, of course, has been in addition to the sums sent to China from private philanthropic sources. This official aid took the form on December 15, 1938, of a loan to China of \$25,000,000. This loan was in the form of a credit extended to a Chinese corporation by the United States Export-Import Bank. Ambassador Hu Shih, in an address on December 9, 1939, has said, with reference to the loan, that it was responsible for China's securing subsequently more credits from other countries amounting to over \$50,000,000. He added:

The world little recognizes that twenty-five million dollars' credit was a thousand times more significant than the figures might indicate,

because this financial assistance came at a time when China's last main access to the sea had been cut off with the loss of Canton, and her morale probably at the lowest ebb. Future historians will surely say that the Export-Import credit of last December, not a very large amount in itself, had the magic effect of reviving and buttressing the spirit and morale of the Chinese resistance, because it made China understand that she had not been deserted by her friends in her darkest hours of distress.¹²

In the second place, the United States has imposed what has come to be termed a "moral embargo" upon the export from the United States to Japan of certain commodities of direct military usefulness. These goods were, at first, airplanes and airplane parts. On December 20, 1939, Secretary of State Hull extended this embargo to include plans, plants, manufacturing rights, materials essential for the manufacture of airplanes, including aluminum and molybdenum, and technical information regarding high quality aviation gas. This embargo is termed a moral one because it imposes no legal restraints upon would-be exporters, for there are no statutes providing for this. However, though only advisory or admonitory in character, this embargo has been fully effective.

In the third place, the American Bureau of Foreign and Domestic Commerce has officially advised American exporters of all kinds of goods to Japan that it will be to their best interests to send goods to Japan only upon a cash-in-hand basis. This advice, given on June 6, 1938, reads (in part): "In view of all the factors involved it appears advisable that exporters should have a confirmed irrevocable letter of credit in their hands before accepting orders for shipments to Japan."¹³ It is understood by the writer that this advice has been generally heeded with the result that, so far as the United States is concerned, its entire export trade with Japan is upon a cash-and-carry basis.

In the fourth place, and most important of all, the United States on July 26, 1939, gave to Japan abrupt notification that it was exercising its right to terminate upon six months' notice its Treaty of Commerce and Navigation with Japan which had been in operation since 1911. This notification, it is known, was politically motivated, since there was no claim that the treaty was operating to the commercial disadvantage of the United States. The consternation with which this action by the United States was received in Japan is sufficient evidence of its importance.

It seems reasonably clear that the American Government had two purposes in view in abrogating this treaty with Japan. The first of these purposes would appear to have been that the American Government desired its action to serve as a definite and serious warning to Japan that she might expect some strong action upon the part of the United States in case she should continue to disregard her obligations to the United States under her

¹² Extracts in New York Times, Dec. 10, 1939, p. 43; Dec. 21, 1939, p. 16.

¹³ Dept. of Commerce release, from Finance Division to all district offices.

other treaties to which the United States is a party, of which treaties the Washington Nine Power Treaty is, of course, the most important.

The second purpose had in view by the American Government in abrogating the treaty may safely be assumed to have been the freeing of its hands from the most-favored-nation provision of that treaty. Thus freed, the United States would be enabled to adopt and put into effect any commercial policies discriminating against Japan whether by way of export or import limitations or prohibitions that it might see fit, and without any possible claim that, by so doing, the United States was violating a treaty engagement of its own.

The writer has not seen the point elsewhere discussed, but he is of opinion that, under established doctrines of international law governing the subject of retaliations, it would have been proper for the United States to resort to discriminatory commercial action against Japan, even were the Treaty of Commerce and Navigation not abrogated, provided this discriminatory action were explicitly declared to be retaliatory and for the purpose of bringing pressure to bear upon Japan in order to bring about a cessation of the illegal acts being committed by Japan against the interests of the United States and its citizens, and for compelling indemnification for injuries due to such illegal acts already committed. For, by every definition of the right of retaliation as recognized by international law, it is a right to resort to coercive action, under other circumstances illegal, in order to meet illegal acts being committed by the parties retaliated against. In other words, in cases of retaliation acknowledged to be such, the existence of other normal obligations, whether of a treaty character or as embodied in generally accepted international law, is without significance. However, this point is now of only academic importance, so far as the present relations of the United States with Japan are concerned, since the Japanese-American Treaty has now come to an end.¹⁴

In view of the strong and unqualified positions taken by the United States in its official communications to Japan, which have been referred to in this paper, it appears to the writer highly unlikely that the United States will enter into a new treaty of commerce and navigation with Japan until Japan has met the conditions contained in those communications. Indeed, it is the opinion of the writer that the United States will not consent even to enter upon formal negotiations for a new treaty until satisfactory assurances are received from Japan that she intends henceforth to abide by her treaty obligations, surrender advantages already obtained by illegal means, and make reasonable compensation for wrongful injuries already done to American interests in China.

¹⁴ Since the above was written, the author's attention has been called to the article by Professor Quincy Wright entitled "Legal Status of Economic Sanctions," in *Amerasia*, February, 1939, in which he takes substantially the same position. The subject was discussed by the Sanctions Committee of the League of Nations in the Italy-Abyssinia case, but in that case there was the Covenant of the League which could be held to overcome earlier treaty commitments.

It may, perhaps, be placed to the credit of the United States, in its dealing with the Sino-Japanese conflict, that President Roosevelt, during the period the so-called Neutrality Joint Resolution of 1937 was in force, refused to exercise the discretion vested in him by that resolution to declare that a state of war existed between China and Japan and that, therefore, the provision of that resolution prohibiting the export to either China or Japan from the United States of arms, ammunition or implements of war should be applied. This exercise by President Roosevelt of his discretion was almost certainly motivated, to a considerable extent, by the belief that such a prohibition would, upon balance, operate more to the disadvantage of China than to that of Japan, for China was in dire need of arms, ammunition and implements of war, because she was by no means adequately equipped to manufacture them herself, whereas Japan, so long as she could get the necessary raw materials, which, it is to be observed, did not come within the prohibition, could, by manufacture, satisfy her military needs.

Turning now from acts by the United States which can be said to have favored China in her conflict with Japan, to the debit column of the account is the fact that the United States has as yet taken no effective steps, beyond advising that transactions be based upon cash in hand, to prevent the export from the United States to Japan in very considerable quantities of such goods as oil, gasoline, scrap iron, steel and other goods vital to Japan in carrying on her war against China.

Although as a question of American constitutional and statutory law the matter is not perfectly clear, the general legal opinion in the United States has been that there does not exist sufficient executive, that is, Presidential, authority to impose effective restraints upon this trade; in other words, that these restraints can be effectively imposed only as authorized by Congressional legislation. At any rate, it would appear that the executive branch of the American Government has not felt it wise, as a domestic proposition, to exercise what discretionary statutory powers it may have had without a Congressional approval previously secured. And, until the Treaty of 1911 with Japan was terminated, the general view was that Congress itself could not act effectively without being subjected to the criticism that it was acting in violation of the most-favored-nation provision of the treaty.

Aside, however, from these legal considerations, there is a factor which still powerfully operates, and that is the unwillingness of the American people to approve acts upon the part of their government which may lead to a war with Japan, and a strong fear that an embargo against Japan's imports from the United States or upon her exports to the United States of a severity sufficient to hamper her seriously in her war with China, will lead Japan to reprisals or other steps which would make almost inevitable war between the two countries. At the same time, the evidence is clear that Americans very generally have deemed it most unfortunate, if not, as many think, highly discreditable, that the United States should have served, and be still serving,

as a base of military supplies for Japan. It is true that in mitigation of this fact it has been argued that, should the United States refuse to engage in this trade, the only effect would be that the trade would be diverted to other shores; but, since the outbreak of the present European war, this excuse has been canceled because it is now impossible for Japan to obtain military materials in amounts anywhere near adequate except from the United States.

This matter of a possible embargo by the United States of trade with Japan with the avowed purpose of making it impossible for her to continue her war against China is one with many facets, and cannot be dealt with in any comprehensive way in the present paper. All that can be here said is to point out some of the factors or influences which tend to indicate that the United States will resort to forms of strong commercial pressure upon Japan in case she does not abandon her aggressive and imperialistic policies.

In the first place, the termination of the Treaty of Commerce and Navigation with Japan certainly indicates that the Government of the United States considers that there is a possibility, if not a probability, that, in the near future, a situation will exist which will make it desirable that the United States should resort to commercial retaliatory action against Japan.

In the second place, it seems somewhat significant that the American Government, in its note of October 6, 1938, should have taken pains to call to the attention of the Japanese Government the fact that, contrary to the manner in which American interests in the Far East had been treated by the Japanese, the Government of the United States had "not sought either in its own territory or in the territory of third countries to establish or influence the establishment of embargoes, import prohibitions, exchange controls, preferential restrictions, monopolies or special companies designed to eliminate or having the effect of eliminating Japanese trade and enterprises." It would seem clear that, by the use of this language, the American Government sought not only to specify the kinds of Japanese action to which it objected, but at least to suggest to the Japanese Government that, should the American Government see fit, it would be justified, by way of retaliation, in resorting to similar forms of action.

In the third place, there is, of course, the speech of President Roosevelt at Chicago, on October 5, 1937, in which he declared it to be "a matter of vital interest and concern to the people of the United States that the sanctity of international morality be restored"; that, "when an epidemic of world lawlessness is spreading, a quarantine is justified"; and that "positive endeavors to preserve peace" are needed in order that nations, tempted to violate their agreements and the rights of others, may be persuaded to desist from such wrong-doing.

It is true that general public opinion in the United States did not, at the time, dominantly rally to the support of the implications evident in such strong statements as these, but, however much President Roosevelt may have been in advance of the then willingness of the people to enter upon positive

action in defense of international law and order and of their own national interests, it is the belief of the writer that they have been steadily, if slowly, advancing toward the position taken by the President in his Chicago speech. And especially have they shown the advancement in the matter of their willingness to support an embargo upon the export of implements of war, including scrap iron and high-grade aviation gasoline, to Japan. In the United States, as is known, there have been created and are now operating, processes for ascertaining with surprising accuracy the progress and status of public opinion upon specific policies, and that American popular opinion has been advancing in the direction that has been indicated is shown by the tests made by these agencies, the principal one of which is the so-called Gallup Poll.

It is known that, in the present session of the American Congress, proposals for the imposition of certain forms of embargo upon trade with Japan will be discussed,¹⁵ but it is impossible for anyone to predict with confidence what the action by Congress will be. Although the writer is compelled to close upon this uncertain note, he would repeat his conviction, expressed in the earlier parts of this paper, that the United States will not give its support to any settlement of the Sino-Japanese situation which will conflict with the essential desires of the Chinese people.

¹⁵ For a list of the bills and resolutions relating to the Far East pending in the present Congress, see *Amerasia*, January, 1940, pp. 508-509.

EGYPT: THE TRANSITION PERIOD

BY JASPER Y. BRINTON

Mixed Court of Appeals, Alexandria

The Egyptian problem presents two aspects. One concerns the purely political struggle for independence. The other has to do with the favored position of foreigners in Egypt under the régime of the Capitulations. The former was primarily a private concern between the two countries involved—Egypt and Great Britain. The other, while touching in a special manner the responsibilities accepted by the "occupying Power," concerned in an important manner the several foreign nations which had come to have stakes of great importance in the country—interests of a commercial, professional, educational, religious and even semi-political character. The separate nature of these two aspects of the same problem is well illustrated by the fact that two entirely separate series of international negotiations were required to deal with them. (The problem of political sovereignty was covered by the Treaty of London concluded between Great Britain and Egypt on August 26, 1936. The problem of the Capitulations was settled by the Convention Regarding the Abolition of the Conventions signed on March 8, 1937, between Egypt and the representatives of fourteen foreign Powers. In each case the solution reached called for the establishment of a period of transition.)

First, as to the problem of sovereignty as presented by the British occupation. With the increasing importance to the Empire of the Suez Canal, the question of the termination of that occupation, repeatedly declared in official pronouncements to be only temporary, became more and more embarrassing. (At the opening of the World War, it was touch and go as to what would be the future relations of Egypt and the Empire. Annexation, incorporation as a self-governing Dominion within the Empire, complete independence—all these were considered, and deliberately rejected in favor of a protectorate.)

At the end of the war, an Egyptian National Delegation presented to the Peace Conference Egypt's claims to the recognition of her independence. The appeal laid special stress on the "innumerable sacrifices" made by Egypt during the war in the Allied cause, and on the fact that "the entire resources of Egypt in men, material, money and in agricultural and industrial products were placed at the disposal of the military authorities." But other more pressing problems prevented that attention being given to Egypt which might have calmed the rising tide of nationalism. The powerful and benign influence of Lord Cromer, greatest of all modern pro-consuls, was no longer available to inspire confidence and assure calm.

Uprisings and deportations followed. The relations between Great Britain and Egypt passed through a period of severe trial. In 1922 a declaration was made by Great Britain abolishing the protectorate and recognizing Egypt as an independent sovereignty—with reservations. These latter, as everyone saw, were in themselves the contradiction of sovereignty, and the bitter struggle was resumed. A draft treaty was adopted, only to be rejected by the Egyptian nation. By a hair's breadth, a second draft, which would have received the nation's support, failed in the last stages of negotiations. Finally, in August, 1936, there was signed at London the treaty¹ which had the supreme merit of reconciling the claims of Egyptian sovereignty and the safeguarding of vital imperial interests. By it Great Britain terminated the military occupation of Egypt, agreed to support the claims of Egypt to admission to the League of Nations as a sovereign and independent state, and concluded with Egypt a perpetual political alliance, providing, in the event of a threatened conflict between either party and a third Power, for "consultation" between the two contracting Powers with a view to a pacific solution of the difficulty and, in the event of a war notwithstanding such consultation, imposing upon each Power the obligation of coming, as an ally, to the assistance of the other, Egypt's aid in such case to consist in supplying Great Britain, on Egyptian territory, all facilities and support within her power. Looking to the vital problem of the defense of the Canal, the treaty declared that until Egypt was in a position to assume alone this duty, Great Britain should have the right to station the necessary troops in the Canal Zone, their presence, however, not to have in any respect the character of an occupation. If at the end of twenty years the two countries were not agreed as to the ability of Egypt to defend the Canal alone, the question was to be submitted to the League of Nations. So too, a twenty years' period was provided, after which either party might ask for a revision of the treaty, except as might touch the question of the military alliance. The ticklish question of the Sudan was handled by the simple device of leaving matters to be regulated by the somewhat laconic but none the less highly practical condominium treaty of 1899, whose terms were broad enough to allow every interest to be amply protected, given only the maintenance of the era of good-will which was implicit in the whole agreement.

The treaty further avoided troubled waters in not touching the question of the future status of the Suez Canal, the concession for which reverts to the Egyptian Government in 1888, upon compensation of the Canal Company; nor was the problem of the neutralization of the Canal, guaranteed by the treaty of 1888, involved in the discussion.

Within a few months of the signing of the treaty there followed the Abyssinian conquest, with the danger that the Suez Canal might become involved in the struggle, and that the country might also have to repel a military attack from the west. Needless to say, these events and the large-scale

¹ Treaty of Alliance, Aug. 26, 1936. This JOURNAL, Supp., Vol. 31 (1937), p. 77.

1938 ✓ measures taken by Great Britain to guard the country from external attack served as a singularly fitting epilogue to the treaty, and confirmed in the most tangible form the wisdom of the alliance. Coöperation in the carrying out of its conditions has been close and encouraging. (In August, 1938, Great Britain accepted a generous modification to the military clauses, in agreeing to defray one-half the expenses of providing suitable accommodations for the British forces to be transferred to the Canal Zone, instead of merely one-quarter as provided by the terms of the treaty, these expenses (approximately £12,000,000) having in the meantime revealed themselves to be considerably higher than the original estimate.)

✓ For the moment, however, this program has largely given place to the more immediate necessities of military preparations on the part of both the allies. On Egypt's side these efforts have been most noticeable in the expansion and training of her armed forces, a measure of self-defense which has entailed a heavy burden on the budget. The British effort, while felt in every field, has been most evident in the training maneuvers undertaken by the fleet stationed in Alexandria, and in the development of air defenses. These efforts have been supplemented by the development of an extensive air-raid protection system in which civil and military authorities have co-operated.

(Thus) ✓ Such, on its purely political side, is the solution of the Egyptian problem. With her independence fully recognized and guaranteed by a perpetual military alliance, Egypt is today among the favored nations in a troubled world.

✓ But even in this treaty, and on account of Great Britain's predominant position in Egypt, it became necessary also to broach the thorny question of the Capitulations. It is true that on this ground, Great Britain's position was, legally speaking, the same as that of all the other Capitulatory Powers. As Lord Cromer had once observed, "This equality is no mere fiction. It is a reality of the utmost consequence. For it is owing to this legal status of equality that the Capitulations cannot be modified without the consent of every European power." But obviously, in dealing with foreign Powers, Egypt was dependent on British support. On the one hand British "advice" could not be disregarded; and on the other, the support of British "influence" was indispensable to the success of any foreign negotiations. This influence was now promised to Egypt in no uncertain terms. Great Britain formally recognized that the capitulatory régime was incompatible with the spirit of the times and the actual state of Egypt. She agreed to "collaborate actively" with the Egyptian Government, and to use all of her "influence" with the several Capitulatory Powers to bring about, through diplomatic negotiation, a rapid abolition of the existing régime.

✓ Such was the agreement that led to the convening on April 12, 1937, of

² Art. 13, Annex, par. 3, Treaty of Alliance, 1936. This JOURNAL, Supp., Vol. 31 (1937), pp. 85, 86.

the Conference of Montreux, ("La Conférence des Capitulations," as it was officially styled, and which in the short space of one month produced a series of agreements covering every aspect of the capitulatory régime—a régime probably more complicated in its structure and more delicate in its adjustments than that which has governed the rights of foreigners in any country of the world.)

Fifteen delegations met at Lausanne. Among the former Capitulatory Powers Germany, Austria and Russia had, as a result of the war, lost their capitulatory privileges and were not represented. Besides Great Britain, there still remained, however, the United States, France, the three Scandinavian Powers, Holland and Belgium, Spain and Portugal, Italy and Greece. And to these were added separate delegations from South Africa and the Irish Free State.

Egypt sent to the conference its ablest men, and to the careful preparation of their case and to the diplomatic skill with which they defended it was largely due the notable success which attended the Egyptian cause. The Egyptian delegation included its Prime Minister, the President of the Chamber of Deputies, the Minister of Finance and the government's principal legal adviser, a man of exceptional ability and long experience with the intricacies of the problems to be presented to the conference.

The foreign delegations also numbered many men of ability, with experience in the problems to be discussed. The Greek delegation, for instance, included two former Ministers of Foreign Affairs and an ex-Minister of Justice. One of these, Mr. Politis, was a diplomat of international reputation. Another, who had also been Minister to Washington, was the leader of the Bar of the Mixed Courts. A third had served on the Court of Appeals of that institution. The British delegates were the Parliamentary Under-Secretary of the Foreign Office, the Counselor of Embassy at Cairo, and one of the Legal Advisers of the Foreign Office who had visited Egypt to study the problems to be presented to the conference. The American delegate was the American Minister to Egypt, a former member of the Florida bench, who was assisted by two experts from the State Department. But the cause of foreign interests suffered from a lack of the first essential—a common front. The Capitulatory Powers were without leadership. Great Britain had pledged her support to the Egyptian cause and loyally honored her engagement. Italy had already announced that she would support the Egyptian viewpoint and France was for various reasons not in a position to assume active leadership in the debates. The foreign delegations found themselves confronted by a clear-cut, carefully elaborated and logical program supported by gentlemen who were masters of their subject and had an answer prepared for every objection. As one of the members of the Egyptian delegation later expressed it, in a published review of the proceedings,

This adroit method of procedure permitted the Egyptian delegation to focus the debate immediately upon its own text thus obliging the




foreign representatives to direct their questions to the Egyptian delegates only to elicit replies which had been carefully prepared and which were precise and convincing. At no moment was the discussion lost on uncertain ground. The proof is that the conference expressed no desire to engage in any general discussion, and accepted the proposal to examine the Egyptian text article by article.

The justice of this appraisal finds echo in the report made to the French Chamber of Deputies on the question of the ratification of the convention:

Egypt directed the course of the discussions from the beginning: It is said that a different result might have been obtained. But for this, it would have been necessary for the Capitulatory Powers, or at least those which had important interests in Egypt, to unite beforehand and to present themselves with a common front and a program established in advance. The thing was not done. It remains but to recognize the fact without vain regrets.

Moreover, the whole nature of the discussions favored the Egyptian cause. To begin with, their delegation entered the lists with the advantage of an impregnable logical position. (The "abolition of the Capitulations" had already been accepted in principle, and the logic of Egypt's demand for complete freedom of legislative and judicial action was, generally speaking, unanswerable.) The problem was essentially one of ways and means, of times and seasons, of the speed with which, and the manner in which, so radical a change should be effected, and of the opportunity which should be afforded to foreign interests to adjust themselves to new conditions. Egypt could stand firm on general principles. The foreign delegates had to invoke the imponderables—considerations depending on experience and judgment, not admitting of eloquent appeal or logical demonstration. If there were solid practical reasons opposing hasty changes it was difficult to make the most of them, all the more so that all the foreign delegations approached their task in a spirit of the most cordial good-will towards Egypt and that the character and ability of the Egyptian representatives constituted, so to speak, a standing reply to any intimation that Egypt was not fully competent to assume immediately all the responsibilities that hitherto she had shared with outsiders.

In the last analysis the foreign position stood on the historic fact that the capitulatory régime in Egypt had not been unilaterally imposed. It had been the result of a bargain, and represented the price voluntarily paid by Egypt as a means of attracting to the country that influx of foreign capital which had been chiefly responsible for a century of phenomenal prosperity. This contribution had come to represent roughly one-half of the total capital of the country. It had been responsible for the development of a highly complicated commercial life. The foreign enterprises which had contributed their capital had brought to Egypt their corporate organizations, their language and the traditions of the legal systems under which



they had been created. This condition of affairs had imposed on the country the necessity, in order to escape from the "judicial chaos" which had come to exist, of providing a judicial machinery adequate to deal with an enormous mass of difficult and important litigation. (The Mixed Courts, established in 1875, several years before either the British occupation or the establishment of purely Egyptian civil courts, had been the response to this demand. The new system had succeeded far beyond the dreams of its founders and had become the rock upon which the commercial credit of the country had stood for over sixty years.)

It would be beyond the scope of the present article to examine even in cursory manner this or any of the other judicial institutions involved in the capitulatory régime. Enough that (the Mixed Courts are an integral part of the judicial organization of the country and form a complete judicial system of trial and appellate courts to which has been drawn, by reason of the jurisdictional test of a "foreign interest", (all important litigation) that its judges are appointed by, and render justice in the name of, the Egyptian Crown, and are paid by the Egyptian treasury, that the annual output of written decisions exceeds thirty thousand; and that by reason of the great professional interest of the work, the complete independence of the posts, and the offering of material advantages favorable by comparison with European standards, the Courts have been able from the beginning to take a position in the front rank of European judicial systems, for in this respect at least, Egypt may be considered, in the words of Mohamed Aly, as part of Europe.

(The contribution which this system made to the welfare of the country has been universally recognized by Egypt. (But the system had its defects. It failed to absorb, as it could have done, had the original plan of the founders been carried into effect, the very considerable criminal jurisdiction which was still reserved to the consular courts.)) (It had also led to the functioning, side by side, of two completely separate and independent legal systems—the National Courts and the Mixed Courts, without any steps having been taken looking to their gradual amalgamation.) Essentially, moreover, the system, while it owed its creation to an Egyptian statesman, was in derogation of national sovereignty. While the Egyptian claims as presented in the twenties, contemplated the more or less permanent maintenance of the Mixed Courts, with relatively slight modifications, the statesmen of 1936 had come to feel that a definite time limit to the existence of the Mixed Courts as a separate judicial institution must be fixed, and this point of view had been tacitly accepted by the Powers in advance of the conference. The problem was, therefore, how to bring the existing situation to an end without injury to the interests involved.

€ Broadly speaking, the principle of the establishment of a transitional period had already been tacitly accepted. The London Treaty had specifically suggested the creation of such a period "during which the Mixed

Dr. H. K. Jones

Courts will remain and will in addition to their present judicial jurisdiction, exercise the jurisdiction at present vested in the Consular Courts." How long then should this period be?)

On this question, although an eighteen-year period, divided into transitional stages, had been strongly urged, and would probably have been adopted had the Powers been in accord, the Egyptian proposal for a twelve-year period was in the end accepted, and with it a second principle of considerable importance, according to which a substantial modification of the régime both in the matter of judicial personnel and in that of jurisdiction should begin immediately. The terms of the London Treaty, quoted above, had led many to believe that the essential characteristics of the system would be maintained intact throughout the transition period, or at least throughout a considerable portion of it. The Egyptian Government, however, supported its demand for certain immediate transformations by the very plausible argument that it was of the essence of a transition period that opportunity be given to those who must assume responsibilities at the end of that period to prepare themselves for their new duties by association with those presently in charge of the system. This implied a larger Egyptian representation on the judicial benches. It was thus decided to abandon, as far as the Trial Courts were concerned, the fundamental principle of a foreign majority and to allow Egyptian judges to be named to all new vacancies, provided that the total foreign membership of the three Trial Courts established at Alexandria, Cairo and Mansourah, and which at the signing of the treaty was to be forty as against twenty-one Egyptians, should not fall below one-third. This modification was not extended to the Court of Appeals, which retains its majority of twelve foreigners and eight Egyptians. In both the Appellate and Trial Courts Egyptians are made eligible to the important post of president judge of a chamber, as also, in the case of the three lower courts, to the administrative post of President of the Court. The Presidency of the Court of Appeals, however, is reserved to a foreigner, that of the Vice-Presidency to an Egyptian. The first holder of the latter office was the senior Egyptian member of the Court, Zulficar Pasha, the father-in-law of the reigning sovereign.

At the present moment, taking into consideration certain concessions made to individual Powers since the signing of the Montreux Convention, the judicial personnel of the Courts is thus distributed: Court of Appeals: Egypt, eight; Great Britain, three; France, two; Italy, United States, Greece, Spain, Norway, Switzerland, Belgium, each, one. Trial Courts: Egypt, twenty-five; Italy, five; Greece and Belgium, each, four; France, three; Great Britain, the United States, Denmark, Spain, Norway, Holland and Sweden, each, two; Portugal, Germany, Austria, Hungary and Switzerland, each, one. The list, it will be noted, includes four countries—the four last named—which were not, at the time of the Treaty of Montreux, entitled as

¹ Art. 13, Annex, par. 1 (ii).

of right to be represented in the Courts. The situation of Germany and Austria has been mentioned, and Switzerland had never been a Capitulatory Power. However, as the two Austrian and German judges have been prevented, by political reasons, from returning to Egypt to resume their judicial duties, the Egyptian Government has decided to consider these posts as vacated, and Egyptian judges will be appointed to take their places.

Such were the principal modifications in structure to be applied to the Mixed Courts during the twelve years of their guaranteed further existence. The treaty included many other modifications touching principally questions of jurisdiction and of administrative law, some of them of very considerable importance, but of a character too technical to permit of present discussion.

One modification, however, of capital importance, has already been referred to, namely, the transfer to the Mixed Courts, during the period of activity still conceded to them, of the jurisdiction hitherto reserved to the consuls in both civil and criminal matters involving only their own subjects. The anomaly of criminal justice being administered by consular courts, owing allegiance to foreign sovereigns was as indefensible in theory as it had proved itself objectionable in practice. To the decision now made to transfer this consular jurisdiction to the Mixed Courts during the period of transition one exception was made. The Capitulatory Powers remain free to retain the old jurisdiction, during the transition period, in matters of personal status involving the foreign law, the field, generally speaking, of decedents' estates and domestic relations.

Thus, while on the one hand the period of life of the Mixed Courts has been given a fixed limit, October 14, 1949, on the other hand they find their jurisdiction in some respects materially extended. This change made necessary a revision of the Penal Code and the Code of Criminal Procedure. Thanks to elaborate studies which had been made by special commissions in previous years, it was possible to promulgate these codes immediately after the signing of the treaty. They represent the most advanced trend in European criminal jurisprudence. For practical reasons, the jury system has not been adopted; the trial of felonies, after an elaborate preliminary procedure including an "instruction," or investigation, conducted by one of the judges of the Trial Court in the capacity of "*juge d'instruction*," is had before a court of five judges, including two members of the Court of Appeals, and with a further right of appeal on points of law to the traditional Court of Cassation, composed of members of the Court of Appeals alone; misdemeanors are tried before a court of three judges, again with an appeal on questions of law to the Court of Cassation. It is an interesting commentary on the force of the French tradition of the "*double degré*," or the right of every litigant to a retrial of his case on appeal, that the failure of the new system to provide for such a retrial on the facts in the case of misdemeanors, has given rise to an active movement on the part of the Bar to remedy what is considered a serious defect.

The new criminal system has been in operation for two years and has given general satisfaction.

The situation of the judges and employees of the Mixed Courts, the latter upwards of a thousand in number, and also that of the Bar, was made the subject of a formal declaration by the Egyptian Government. As to the judges the Government declared that it did not intend to alter "either the existing conditions of service or the present salaries," and as to the employees, declared its intention not to alter salaries. In the case of the Bar the question has given rise to anxious discussion. As might be expected, the Bar numbers many of the ablest men in the country. For three generations it has formed an intellectual élite to which Egypt owes a heavy debt. As in France, it has been closely organized; there is no question of "integration"; the Bar Association—*le barreau*—is the Bar; in every court-house it possesses handsome quarters; its presiding officer, the *Bâtonnier*, on official occasions walks with the titular heads of the two other orders of the law—the Courts and the *Parquet*. As an association it is constantly alert in the defense of the interests of the profession and of its own members. An illustration of its solicitude in such matters is seen in the fact that it has accumulated a fund of close to a quarter of a million dollars as the basis of a pension and relief system in aid of lawyers overcome by age or misfortune.

By the terms of the treaty, the Government agreed that the members of the Mixed Courts Bar should be transferred to membership in the Bar of the National Courts at the end of the transition period. Practice before these courts, however, entails a perfect knowledge of the Arabic language, a condition which would be practically impossible of realization in the case of several hundreds of the non-Egyptian members of the Mixed Courts Bar, who have passed long years in the practice of law in a purely French system. Of the 829 members of the Bar (not counting some 175 graduate law students pursuing their *stage* in law offices), about half are of Egyptian nationality and half are foreigners; but in the entire body only 83 are also members of the native Egyptian Bar. Many of these gentlemen will be thus condemned to the tragic fate of seeing their profession sink away beneath their feet at the end of the unhappily short period fixed for the liquidation of the Mixed Courts.

The situation was foreseen before Montreux and had already formed the subject of discussion between the Bar and the Government. The representations of the Bar had taken the form of a request that the Government agree to contribute annually, during the period of transition, to the pension fund of the Bar a sum which would eventually permit the payment to its members of a small pension. These representations were renewed at Montreux, and a declaration was made on behalf of the Egyptian Government that "it would examine in a friendly spirit (*avec bienveillance*) the demands presented by the Bar." Since the going into effect of the treaty, active negotiations have been conducted but without result, the Government having limited its

offer to a proposal to pay a pension, not exceeding in amount twenty pounds monthly, to those members of the Bar who were not equipped to plead in the Arabic language, who were without other means of support, and who, at the date of the treaty, had reached the age of thirty-five. This proposal has been considered by the Bar as not responsive to the spirit of the Government's undertaking at Montreux, and discussions are proceeding. The *Bâtonnier*, who has the honor of representing the Bar in these delicate negotiations, is the distinguished figure of whom mention has been made, a former Greek Minister to the United States. In view of the traditional generosity of the Egyptian Government, the high sense of honor it has always shown for the respect of its engagements, and the interest of all concerned to settle in family council this thorny but vital problem, it seems probable that an acceptable solution will be eventually forthcoming.

Turning from the judicial to the legislative side of the picture, it was here that Egypt found perhaps her most serious practical grievance in what had come to be a most onerous restriction on her sovereignty. (The privilege of immunity from the *jurisdiction* of Egyptian national courts, which was the basis of capitulatory rights, had led to what was in effect a complete legislative immunity for the foreigner from the sanctions of Egyptian law, except in so far as such law had been expressly accepted by the Powers.) In practice this immunity had been tempered in several directions. The obligation to pay a land tax had been long accepted, as also a house tax and certain municipal taxes. Customs duties had been covered by a series of commercial treaties, but these had recently expired and Egypt had made full use of her freedom in this field. Excises or taxes on the products of local industries were also applicable to foreigners. (As to other general legislation, prior to 1911 the consent of the Powers had been required before any such legislation could be applied to their nationals. In that year, after the failure of many efforts to establish an international legislative body, an agreement was put into effect confiding to the Court of Appeals of the Mixed Courts the legislative function of giving approval in the name of the Powers to new legislation other than tax measures.) The solution was anomalous, but it had had the merit of solving for the time being a pressing practical problem and had worked well. Under its régime much useful legislation was enacted.

Obviously such a system was a serious restriction on national sovereignty and its abolition had long been conceded to be a matter of course. The only question was the rather delicate one of what assurances Egypt could be reasonably asked to give, having in mind the enormous interests represented by foreign capital.

(Under the solution adopted by the convention, Egypt is conceded complete legislative independence, but she accepts a definition of this freedom. It is to be "understood" that the legislation to which foreigners shall be subject "will not be inconsistent with the principles generally adopted in modern legislative systems and will not, with particular relation to legislation,

of a fiscal character, entail any discrimination against foreigners or against companies incorporated in accordance with foreign law wherein foreigners are substantially interested."

(In the event of a conflict arising on a given law, the question, as all other questions touching the interpretation of the convention, may be submitted, on demand of one of the Powers, to the Permanent Court of International Justice, subject to the existence, as in the case of the United States, of special treaties of arbitration.)

This rule of non-discrimination was properly regarded by the delegations at Montreux as one of great importance. As Mr. Politis, the leader of the Greek delegation, observed, "According as it is wisely or unwisely applied, the next twelve years will become a true period of transition, preparing the normal evolution of the present towards the future, or it will be, on the contrary, a period of liquidation of foreign interests, leaving Egypt in a position of isolation." In a country where foreign capital occupies a predominant position in many branches of commercial activity, the question of whether a particular tax, although general in its terms, is, none the less, in fact, a discrimination against foreign capital, may become a very delicate and vital one. The Egyptian Government took pains to insist that the mere fact that a tax, for instance, an income tax, should prove to fall more heavily on the foreign population than on the great mass of the Egyptian inhabitants, who were tillers of the soil, and as such subject only to the land tax, could not be taken as implying a discrimination; nor could conditions, uniformly imposed, touching the practice of the learned professions, which might include a knowledge of the Arabic language. On the other hand, the Egyptian Government did not hesitate to declare that the limitation was accepted in spirit as well as in letter, and that there need be no fear that a means would be sought by roundabout method to avoid its plain intent. ✓

As was natural, the principal legislative activity of the Government has been directed to fiscal measures. In January of last year a comprehensive income tax law was promulgated. On income from securities, loans, mortgages, etc., the tax is fixed on a graduated basis up to 1942, after which it is to be 10 per cent: 1938-1939, 7 per cent; 1940, 8 per cent; 1941, 9 per cent. A tax of similar amount is imposed on business profits, individual and corporate, and on income from commercial pursuits generally. On the salaries of employees, including public officials, as well as on pensions and bonuses, the tax is on a graduated scale: 2 per cent on the first 120 pounds (the value of the pound is pegged at a few cents higher than the pound sterling); 3 per cent on the next 180; 4 per cent on the next 200; 5 per cent on the next 300; 6 per cent on the next 400; and 7 per cent on any sum beyond that amount. In the case of the liberal professions, law, medicine, architecture, engineering, accountancy, etc., a more lenient régime is established, the tax being fixed at $7\frac{1}{2}$ per cent of the rental value of the premises occupied (10 per cent in case the office and residence are one). Moreover,

in this category no tax is due during the first five years of professional life, nor after the taxpayer has reached the age of sixty.

In May of last year there was also promulgated a very elaborate stamp tax covering nearly every form of transaction readily susceptible to such form of taxation and including, needless to say, a tax on checks ($2\frac{1}{2}$ cents) and all forms of receipts. By decree of January 28, 1940, the internal revenue tax on beer was raised from 66 to 240 piastres a hectoliter, *i.e.*, to approximately 44 cents a gallon. An inheritance tax has been drafted, but at present writing has not been adopted. The budget for 1939-1940 estimates receipts at forty and one-half million pounds and expenditures at forty-two million pounds, the deficit to be met out of state reserve funds.

The period of transition is now well on its way. During the three years which have elapsed since the Treaty of London, and the two years since the going into effect of the Treaty of Montreux, all the topics covered by the treaties have been actively explored. The machine of transition has been set in motion and is working. Many problems have to be faced—that of unemployment among thousands of educated young Egyptians is only one of them—and certain foreign interests are bound to suffer. But Egypt's hospitality to the foreigner is traditional. One may recall with encouragement the words of the Egyptian Prime Minister who presided over the delegation at Montreux, and who is now leader of the national opposition:

Let those who do not already know us be reassured. In what country of the world can one find a more complete harmony between its own citizens and the foreigners? Where can they find a hospitality, a tolerance, an affability in every contact, a friendship equally genuine, and one so long anchored in the hearts of the people that it has become a tradition and a second nature. To these feelings of friendship there is added another factor, the interest which all of us have to preserve intact, a most useful collaboration, one which promises to be richly fruitful hereafter. I pay public tribute to the scholars, the teachers, the financiers, the merchants, to all those generations of foreigners of ability and good-will who, for more than a century, have been bringing to our country the treasures of their knowledge, their experience and their energy. The memory of this contribution will be forever recalled in the cordial relations which so happily exist among all the inhabitants of our country and in that very special welcome which Egypt reserves for her foreign guests. The traditions of tolerance and of liberalism of which Egypt has always given proof will permit not only the material but also the intellectual and spiritual welfare of foreigners to develop freely under the protection of our laws.

It is on this note of good-will, based on solid reasons of practical advantage, confirmed by long experience, that the hope of the permanence of the solution of the Egyptian problem must repose. As conditions in the world stand today, that hope would seem prepared to meet a severely critical test.

AMERICAN CIVIL WAR PRECEDENTS: THEIR NATURE, APPLICATION, AND EXTENSION

BY ALICE MORRISSEY McDIARMID

When the present European war broke out and neutral rights came into the foreground of America's anxieties, the President advised the public to study the conduct of the United States during the Civil War. That desperate struggle is inevitably the American touchstone for belligerent rights because, as Secretary of State Seward pointed out in 1863:

It is . . . obvious that any belligerent claim which we make during the existing war, will be urged against us as an unanswerable precedent when [we] may ourselves be at peace.¹

In 1915, the Government of the United States bore out Seward's prediction by declaring "that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent."² The belief that the British were following American precedents or were pressing further along trails already blazed by the United States helped to vitiate the American defense of neutral rights between 1914 and 1917; but was it correct? Is it true that the United States "modified" international law to its own advantage when national safety dictated? Or to what extent did the United States depart from views it held as a neutral, thereby imperiling its long-run interest in neutral rights? The most notable conversions to belligerent outlook centered around the question of contraband and the application of the doctrine of continuous voyage to blockade and contraband. On blockade itself there was little modification of attitude, and on the interception of persons and mails American action was favorable to neutrals. What has become of these precedents, and how may they affect American policy as a neutral?

When the Wilson Administration was criticized for supineness in dealing with belligerent additions to their contraband lists, its defense was that the past record of the United States made the subject embarrassing to discuss. The United States, Bryan declared, had been in favor of short contraband lists as a neutral, but when it was belligerent had "contended for a liberal list."³ This was true only to a degree, for the United States did not proclaim

¹ State Department Report Book No. 8, pp. 353-361, printed in James P. Baxter, 3d, "Papers Relating to Belligerent and Neutral Rights, 1861-1865," *American Historical Review*, Vol. XXXIV (1928), p. 87.

² U. S. For. Rel., 1914, Supp., p. ix.

³ *Idem*. Bryan's letter was actually planned by Lansing. See Lansing Papers, 1914-15, Library of Congress, Lansing to Bryan, Dec. 26, 1914.

a comprehensive contraband list in the Civil War. On the other hand, though the Civil War list was not extensive, it included goods which had been specifically excluded from the contraband lists of early American treaties. Chief among these were naval stores, hemp and cordage, sail cloth, and ship timber. Declaring these contraband, however, was not a drastic or unwarranted innovation, for the articles in question had often been considered contraband by other Powers.⁴ The embarrassing feature of Civil War contraband policy came at the close of the war. In 1865, when organized hostilities drew to an end, contraband was defined as including gray uniforms and cloth, arms, ammunition, and all articles from which ammunition was made.⁵ This last was a sweeping phrase, destined to plague the United States. It seems to have had no contemporary definition and to have been of little practical importance. In 1901 the United States listed various metals and acids as materials principally employed in the manufacture of arms, although it had not named them as contraband in the Spanish-American War.⁶ This war, in fact, does not bear out Bryan's statement cited above, for the contraband list was short.

At the outbreak of the World War, the United States hoped for the acceptance of the Declaration of London with its long free list. Even though the British did not accept the Declaration *in toto*, their first contraband lists conformed to it.⁷ In September, 1914, however, the lists began to grow, showing that the British were moving away from the principles of the Declaration which had tried to put raw materials on the free list.⁸ At the behest of shippers the United States addressed inquiry about certain products to the British Government, but displayed no zeal in protesting against British extensions of the list. Once when Bryan complained of British restrictions upon neutral commerce, Sir Cecil Spring Rice reminded him of "the principle embodied . . . in President Johnson's proclamation of April 29, 1865" that "articles from which ammunition is manufactured" assume the character of contraband.⁹ Bryan retorted that the United States challenged "the principle that belligerents have the right to add . . . to the list of contraband without reference to the character of the article involved . . ." ¹⁰ At this point, the United States rested, reserving its right to object to the British

⁴ Carlton Savage, *Policy of the United States toward Maritime Commerce in War* (2 vols., Washington, 1934-36), Vol. I, p. 448. For early contraband lists, both American and foreign, see Francis Deák and Philip C. Jessup, *Treaty Provisions Defining Neutral Rights and Duties*, published as Sen. Doc. No. 24, 75th Cong., 1st sess., and in *Neutrality Laws, Regulations, and Treaties* (2 vols., Washington, 1939), Vol. II, Pt. II, p. 1315.

⁵ Savage, *op. cit.*, Vol. I, p. 453.

⁶ U. S. For. Rel., 1901, Appendix, p. 365. For Spanish-American War list, see Savage, *op. cit.*, Vol. I, p. 489.

⁷ Balloons and airplanes were transferred from the conditional to the absolute contraband list given in the Declaration. This was proper according to the terms of the instrument. U. S. For. Rel., 1914, Supp., pp. 215-216.

⁸ *Ibid.*, p. 236.

⁹ *Ibid.*, pp. 371, 379-380.

¹⁰ *Ibid.*, 1915, Supp., p. 307.

contraband lists but never making a formal protest. The British list grew into a long, detailed classification, ranging from acetic acid to zinc ore, and including practically everything between. By failure to protest, the United States strengthened the belligerent thesis that materials which may be used for war will not be used for innocent purposes in time of war, and the more dangerous implication that goods which contribute even in the most remote way to the efficiency and morale of the enemy may be declared contraband. Moreover, when it published its own contraband lists in 1917, it made them general in language and broadly inclusive.¹¹ Thus both the United States and Great Britain have moved far away from the restricted contraband list of the American Civil War.

The trend with regard to contraband in general was paralleled in the case of conditional contraband. Though the contraband list of the American Civil War was a unified list making no mention of conditional contraband, the Supreme Court recognized and discussed the category in the *Peterhoff*. In 1898, for the first time, the United States issued two contraband lists, restricting conditional contraband to coal, materials for railways or telegraphs, money, and provisions destined for the enemy forces. The British World War list, from the very beginning, was far more extensive, and in 1916 treatment of conditional contraband was assimilated to that accorded absolute contraband.¹² When the American contraband list was drawn up in 1917, the term "conditional contraband" was carefully avoided.¹³ In other words, without denying the existence of the category, the United States has been surprisingly chary in its employment of the term.

In considering any nation's policy, however, it is necessary not only to take account of what is listed as contraband, but also to weigh the evidence of hostile destination required for condemnation. Such evidence is of particular importance in case of conditional contraband. During the Civil War, the United States required actual proof of destination to the enemy armed forces. The conditional contraband on the *Peterhoff*, the *Science*, and the *Volant* was released precisely because this proof was not forthcoming.¹⁴ On the other hand, in the *Bermuda*, consignment of a shipment to the order of John Fraser & Company of Charleston was considered "conclusive, in the absence of proof to the contrary, that its destination was the port in which the consignee resided and transacted business."¹⁵

The record of the British in the World War showed significant departures from both these practices. Early Orders in Council, the British Ambassador admitted, had the effect of making foodstuffs destined to a neutral country

¹¹ U. S. For. Rel., 1918, Supp. 1, Vol. II, p. 920.

¹² *Ibid.*, 1916, Supp., p. 385.

¹³ Lester H. Woolsey, "Neutral Persons and Property on the High Seas in Time of War," American Society of International Law, Proceedings, 1935, p. 75.

¹⁴ 5 Wall. (1866) 49; 5 Wall. (1866) 178; 5 Wall. (1866) 179.

¹⁵ 3 Wall. (1865) 542.

absolute contraband.¹⁶ This flew in the face of Lord Salisbury's pronouncement during the Boer War:

Foodstuffs, though having a hostile destination, can be considered as contraband of war only if they are for the enemy forces; it is not sufficient that they are capable of being so used, it must be shown that this was in fact their destination at the time of their seizure.¹⁷

Though the United States quoted Lord Salisbury, it failed to keep open trade in foodstuffs for German civilians even before the Reprisals Order of March, 1915, cut off all trade with Germany.¹⁸ Furthermore, by the Order in Council of October 29, 1914, conditional contraband destined to a neutral port was condemned if it was consigned to or for an agent of the enemy state, or "to order," or if destined to enemy territory.¹⁹ Observe how much further this goes than the *Bermuda*, in which were condemned goods consigned to the order of a merchant in a blockaded port; the British were condemning conditional contraband destined to neutral or unblockaded enemy territory without any proof that the goods were actually intended for the enemy armed forces. The practical difference between absolute and conditional contraband, which the United States had so scrupulously observed in the *Peterhoff*, was thus ignored by the British. In 1916, moreover, Great Britain issued an order abolishing all distinction as to the destination of absolute and conditional contraband.²⁰ Although the British retained the two categories, they treated them alike, condemning both absolute and conditional contraband with a German destination. While the United States made no strenuous objection to the British assimilation of conditional to absolute contraband, in 1917 it did not accept the British presumptions of hostile destination but rather followed its own Civil War policy. Though its contraband list made no mention of conditional contraband, the United States maintained a distinction as to destination, declaring fuel, food, forage, and clothing liable to capture only when destined for the enemy army.

The question of hostile destination of course leads to the doctrine of continuous voyage. Knowing that the United States protested against the Rule of the War of 1756 from which the doctrine sprang, writers have credited the United States not only with the abandonment of its former views but also with the actual evolution of the doctrine from the rule. Perhaps in the whole subject of Civil War precedents there has been no more general or mischievous belief than that the United States in the Civil War made the tremendous innovation of applying the doctrine to contraband-carriage and blockade-breaking, whereas it had formerly been limited to the colonial trade. Writers wholly misjudge the Civil War record of the United States

¹⁶ U. S. For. Rel., 1914, Supp., pp. 233-235.

¹⁷ *Ibid.*, p. 374.

¹⁸ Alice M. Morrissey, *The American Defense of Neutral Rights, 1914-1917* (Cambridge, 1939), p. 35.

¹⁹ U. S. For. Rel., 1914, Supp., p. 262.

²⁰ *Ibid.*, 1916, Supp., p. 385.

when they adopt this view and use it as a measuring-stick to gauge British innovations in the World War. Though the president of the British Prize Court declared in 1915 that there was no reported British case applying the doctrine to contraband, Mr. Lester H. Woolsey in 1910 had pointed out that the prize court applied the doctrine in a pure contraband case, the *Jesus*, in 1761.²¹ Though the American courts did not cite this and other cases, their decisions do not mark a radical departure from the lines of development already marked out. Did the United States make any innovations in the application of the doctrine to contraband-carriage? In the famous letter to Senator Stone referred to above, Bryan seemed to think so, for he declared:

The rule of "continuous voyage" has been not only asserted by American tribunals but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port "to order," from which, as a matter of fact, cargoes had been transshipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery.²²

Determining whether the ostensible was the real destination, however, was certainly not new, but rather was the essence of every continuous voyage case that had ever been decided. Bryan's second point was more important, for in the much criticized *Springbok* decision consignment of goods "to order" at Nassau was held as a negation of any sale at that port for incorporation into the common stock of the island. This, however, was not the sole ground for condemnation of the goods. Bryan's reference shows how heavily the administration felt itself handicapped by this unfortunate decision against which the British Government, in sharp contrast to British publicists, had never protested. In the *Peterhoff*, the most important pure contraband case, absolute contraband was condemned when its ultimate enemy destination was to be reached by inland carriage, but the French had already done this during the Crimean War in the *Frau Howina* without attracting attention.²³ The most important development came in the *Bermuda* and the *Springbok* in which the court held that if a vessel was engaged in "the conveyance of contraband goods to a belligerent port under circumstances of fraud and bad faith," it could be condemned along with the cargo even though the vessel itself was not going beyond an intermediate neutral port.²⁴

Though the American cases dealing with blockade were destined to have

²¹ *The Kim*, (1915) P. 215; and Lester H. Woolsey, "Early Cases on the Doctrine of Continuous Voyage," this JOURNAL, Vol. 4 (1910), p. 827.

²² U. S. For. Rel., 1914, Supp., p. ix.

²³ James W. Gantenbein, *The Doctrine of Continuous Voyage* (Portland, Oregon, 1929), p. 85.

²⁴ *The Bermuda*, 3 Wall. (1865) 542. In *The Springbok*, 5 Wall. (1866) 20, the rule was applied in favor of the ship-owner.

little significance during the World War, they should be mentioned in assessing the policy of the United States. As in the case of contraband, the British preceded the Americans in applying the doctrine of continuous voyage to breach of blockade. Furthermore, according to Mr. O. H. Mootham, in the case of the *Vier Gebroeders* (1804) Lord Stowell applied the doctrine of ultimate destination where goods were captured before transshipment to smaller vessels for blockade-running.²⁵ Students, nevertheless, agree that the Americans went further than any nation had gone before in seizing on the first leg of the voyage vessels which were attempting to break a blockade by ingress. Once the doctrine of continuous voyage is admitted, however, the Anglo-American rule that a blockade-runner is capturable at any point on her journey would seem to justify the American seizures.

Shortly before the World War, the London Naval Conference agreed by way of compromise that the doctrine of continuous voyage should apply to absolute contraband but not to blockade, nor to conditional contraband unless the belligerent had no seacoast. Since the Declaration of London was not ratified, a comparison between the British record in the World War and the American in the Civil War is not precluded. In absolute contraband, the resemblance is very close, both nations confiscating absolute contraband indirectly destined to the enemy. In the field of conditional contraband, however, there is a sharp difference, for the United States condemned no conditional contraband under the doctrine of continuous voyage, while the British did. The first important British step in this direction was the Order in Council of October 29, 1914, which provided that:

conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned "to order," or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee . . . in territory belonging to or occupied by the enemy.²⁶

His Majesty's Government declared that this order merely restored the pre-Declaration of London status of conditional contraband. There are two points raised by this assertion. Did the doctrine of continuous voyage traditionally apply to conditional contraband, and did the British order simply restore the *status quo* disturbed by the Declaration? In considering the first question, it must be remembered that there had been no actual condemnation of conditional contraband under the doctrine prior to 1914. It is highly difficult, therefore, to determine the exact applicability of the doctrine. It seems, however, that the doctrine was considered by the United States as applicable to conditional contraband, because the Supreme Court expressed a dictum to this effect in the *Peterhoff*, and the American delegates

²⁵ Woolsey, "Early Cases," *loc. cit.*, p. 827; James Brown Scott, *The Declaration of London*, February 26, 1909 (New York, 1919), p. 79; O. H. Mootham, "The Doctrine of Continuous Voyage, 1756-1815," *British Year Book of International Law*, Vol. VIII (1927), pp. 72-73.

²⁶ U. S. For. Rel., 1914, p. 262.

at the London Conference were of this opinion.²⁷ The British may, therefore, be upheld on their first point; but were they correct in their contention that the order of October 29, 1914, did no more than prevent an innovation embodied in the Declaration of London? In actuality, the order went far beyond this, laying down presumptions by which articles on the conditional contraband list destined for a neutral port might be condemned as actually intended for hostile use. Furthermore, it shifted the burden of proof from the captor to the shipper. In the *Kim*, the most celebrated case under this order, statistical and other evidence established a strong likelihood that the goods were destined for Germany *via* Scandinavian ports. Their destination to the enemy armed forces, however, was simply inferred from the character of the goods and the fact that, if they were distributed to the military and civilian population alike, "a very large proportion would necessarily be used by the military forces."²⁸

Without mentioning any cases, the United States registered its objections in its note of October 21, 1915:

Whatever may be the conjectural conclusions to be drawn from trade statistics, . . . the United States maintains the right to sell goods into the general stock of a neutral country. . . . Moreover, even if goods listed as conditional contraband are destined to an enemy country through a neutral country, that fact is not in itself sufficient to justify their seizure.²⁹

The British denied that the bulk of merchandise going to Scandinavia was intended for incorporation into the common stock. Perhaps British proofs that certain goods were not intended to become part of the common stock of Scandinavia were as strong as American proofs regarding the cargo of the *Springbok*, but the British, unlike the Americans, could not condemn goods for breach of blockade. In their note, they blandly ignored the American contention that destination to an enemy country through a neutral was insufficient to justify seizure.³⁰

Later, in the *Hakan*, the British court held that it was immaterial whether captured herrings were going to the civil or the military forces since, if fish were fed to the civilian population, meat would thereby be made available for the army.³¹ In the *Balto*, the British held that goods processed before transshipment might be subject to the doctrine of continuous voyage. Tests of ultimate destination changed rapidly and were construed to the increasing advantage of the belligerent. Where the Civil War cases stressed the intent of the shipper and made "a single mercantile transaction" the test of continuity, the World War cases of both belligerents held hostile destina-

²⁷ After the London Conference, the American delegates reported that they had made a concession "in giving up continuous voyage as applied to conditional contraband and blockade." Scott, *op. cit.*, p. 200.

²⁸ *The Kim*, (1915) P. 215.

²⁹ *Ibid.*, 1916, Supp., pp. 373-374.

³⁰ U. S. For. Rel., 1915, Supp., p. 582.

³¹ (1918) A. C. 148.

tion to be objective, and looked beyond the intent of the shipper to the possible termination of the voyage. Finally, there was hardly any step left which a neutral could take with the certainty that it would refute the belligerent assumption of hostile destination.³² Though the Civil War decisions went beyond the early British cases in applying the doctrine to contraband and blockade, they did not go so far as the World War practice by which, apart from the Reprisals Orders of 1915 and 1917, not only was all trade between neutral and enemy liable to interception, but all trade by neutrals with neutrals contiguous to the enemy was under suspicion and likely to be penalized.

Not content with the extension of the contraband lists and the development of the doctrine of continuous voyage in the World War, which amounted to a general prohibition of trade with the enemy, the belligerent nations employed additional methods of carrying on economic warfare. Among these were belligerent licenses and embargoes. Did they have any precursors in the Civil War? Though the facts are little known, they did. In 1862, after the United States had occupied certain Southern ports, it opened them to limited trade. Besides prohibiting the shipment of contraband to these ports, the United States also refused to license the export of liquor, coal, various metals, telegraphic instruments and materials, marine engines and boilers, and their component parts, and any article applicable to the manufacture of marine machinery or armor for vessels. American consuls in foreign countries were instructed to grant licenses for the shipment of other goods.³³ At first sight, this suggests the "navicert" system, so extensively employed in the World War and at present, under which British consuls issue licenses or "navicerts" for the shipment of non-contraband goods from neutral countries.³⁴ There is, however, an important distinction between American and British practice. "Navicerts" are granted to permit shipments to pass through British naval patrols to neutral countries. American consuls issued licenses for goods to enter American ports—a vital difference.

If the present system of belligerent licenses does not resemble that of the Civil War, is there any similarity in the employment of embargoes then and now? In the World War, belligerent export embargoes were designed to conserve stocks and at the same time to force neutral nations to take some action desired by the belligerents. Among the embargoes may be cited the British embargoes on wool and manganese which induced American manufacturers to promise that they would not supply Germany with wool and steel, the German embargoes on certain chemicals and drugs to compel the United States to send cotton, and various belligerent prohibitions which

³² *The Balto*, (1917) P. 79. The Germans did the same in *The Atlas*, (1919) G. A. I. 1924, 252. See C. John Colombos, *A Treatise on the Law of Prize* (London, 1926), pp. 173-181.

³³ Savage, *op. cit.*, Vol. I, pp. 448-449.

³⁴ H. Ritchie, *The "Navicert" System during the World War* (Washington, 1938).

forced the northern neutrals to forbid the export of certain imported supplies. Though it is well known that the United States employed export controls to serve belligerent ends in 1917 and 1918, it is not generally realized that the United States also used embargoes as an instrument of belligerent policy in the Civil War and caused neutral Canada to impose an embargo. The only well-known Civil War embargo is the Confederate ban on the export of cotton. This embargo, however, is a lineal descendant of Jefferson's, since it was intended to coerce European Powers into political action. The Union embargoes were more like those of the World War, for they sought to bring neutral commerce under belligerent control. In the World War, for example, Britain took the position that she could not be expected to furnish coal to vessels engaged in trading with the enemy, and she made bunker control an important agency in the strangulation of enemy trade. While the United States did nothing so far-reaching in the Civil War, it did employ an embargo on coal to prevent the supplying of Confederate commerce destroyers and blockade-runners. By Treasury order in April, 1862, the shipment of coal from the United States to any point bordering on the North Atlantic was prohibited.³⁵ This order gravely inconvenienced the British, for their naval vessels on the West India station were unable to get coal from the United States, and the British-American colonies, both continental and island, were cut off from their usual source of supply. In comparison with their complaints on other questions, however, the British protested only faintly against this measure, admitting its military justification. To Canadians who needed American coal, belligerent necessity was of little comfort. In the spring of 1864, the Executive Council of Canada proposed an embargo on the export of coal if the United States would permit coal to come to Canada. After the British Minister brought this proposal to the attention of the American Government, the United States authorized the export of coal to Canada.³⁶ As an outgrowth of American coal policy, therefore, a neighboring neutral laid an embargo in order to obtain an important raw material, as the northern neutrals did so frequently in the World War.

In the latter conflict, these neutrals also laid embargoes to protect their neutrality. The Civil War again offers a parallel to these, for Canada laid an embargo on the export of munitions. For a long time, the friendly Canadian-American relations to which we are accustomed did not exist, and the Civil War, like the Canadian rebellion of 1837, provided the occasion for border incidents which further embittered feelings. In several instances, Confederates attempted to use Canada as a base from which to undertake military and naval expeditions against the United States, and warlike stores were manufactured in what is now Western Ontario under circum-

³⁵ U. S. For. Rel., 1862, pp. 260-261.

³⁶ Canadian National Archives, Series G, Vol. 465, p. 99, Monck to Cardwell, May 6, 1864; *ibid.*, p. 142, Monck to Cardwell, Aug. 25, 1864; U. S. For. Rel., 1864, Pt. III, pp. 666, 683, 688.

stances which left little doubt that they were intended to outfit Confederate vessels on the Lakes. The Canadian Government, therefore, laid an embargo on the export of warlike stores and munitions of war to safeguard its neutrality.³⁷

Other British colonies in the Western Hemisphere had different problems during the Civil War. In peaceful times, the Bahamas and the Bermudas imported many products from the United States. When war cut off direct trade between North and South, the demand for American goods at Nassau sky-rocketed because transshipment from there to the Confederacy was easy. The United States had no inclination to foster trading with the enemy or to allow its products to strengthen Southern resistance. When, as mentioned above, certain Southern ports were taken and opened to limited trade, Chase, the Secretary of the Treasury, issued an order forbidding the export of contraband and instructing collectors of customs to require bonds in cases where they feared that goods would be used for the benefit of the enemy.³⁸ The Collector of the Port of New York thereupon prohibited the shipment of coal, dry goods, shoes, quinine, other drugs, tinware, munitions, and sundry other articles to Nassau, the West Indies, and other foreign ports when he "had reason to suspect that they were intended, by individual enterprise, or the special contracts of British subjects, to directly contribute to the welfare of the enemies of the United States."³⁹ He declared, in words familiar to readers of British World War notes, that he was making an effort not to interfere with normal trade, but was prohibiting shipments or requiring bonds for extraordinary shipments only.⁴⁰

The Treasury order and the collector's action immediately aroused protest from the British. They did not deny that the United States had the right to prohibit the export of contraband, but they objected to prohibitions on the export of other goods:

Her Majesty's government consider that it would be introducing a novel and dangerous principle in the law of nations if belligerents, instead of maintaining an effectual blockade, were to be allowed, upon mere suspicion or belief, well or ill-founded, that certain merchandise could ultimately find its way into the enemy's country, to cut off all or any commerce between their commercial allies and themselves.⁴¹

They also complained of the bonding system on the ground that it was unreasonable to hold a shipper responsible for the fate of articles after they had passed out of his control. The British Government, indeed, registered emphatic protest against the doctrine of ultimate consumption:

The inference that the articles, though having really and *bona fide* a British destination, are likely to be afterwards used for the purposes of

³⁷ Canadian National Archives, Series G, Vol. 465, pp. 205-206, Monck to Cardwell, Nov. 25, 1864.

³⁸ Savage, *op. cit.*, Vol. I, p. 447.

⁴⁰ *Ibid.*, pp. 275-276.

³⁹ U. S. For. Rel., 1862, pp. 262-263.

⁴¹ *Ibid.*, p. 293.

trade between Nassau and the so-styled Confederate States, is drawn . . . from the magnitude of the consignments, from a comparison between the amount of trade in similar articles carried on between New York and Nassau in former times and the amount during the present war, from the notorious existence of an extensive trade during the war between the so-styled Confederate States and Nassau, and from the known or reputed connexion of certain merchants or mercantile houses in England and at Nassau with that trade. The possibility or probability being thus arrived at that such a use may be made of some of these articles after their arrival at Nassau, it is concluded that the United States government are entitled to stop them at New York. From this conclusion her Majesty's government dissent.⁴²

What a conversion took place between 1862 and 1915! If the British had maintained the view above expressed, they would have laid down no export embargoes in the World War nor used statistical and other indirect evidence to interfere with trade to Germany *via* the northern neutrals. Instead, early in 1915, Sir Edward Grey dealt with an American complaint that British embargoes, especially on rubber, had harmed commercial interests in the United States:

It is, of course, difficult for His Majesty's Government to permit the export of rubber from British Dominions to the United States at a time when rubber is essential to belligerent countries . . . and when a new trade in exporting rubber from the United States in suspiciously large quantities to neutral countries has actually sprung up since the war. It would be impossible to permit the export of rubber from Great Britain unless the right of His Majesty's Government were admitted to submit to a prize court cargoes of rubber exported from the United States which they believe to be destined for an enemy country, and reasonable latitude of action for this purpose were conceded.⁴³

By the spring of 1916, he was insisting:

. . . the fact that a neutral country adjacent to the enemy territory is importing an abnormal quantity of supplies or commodities, of which her usual imports are relatively small, of which the enemy stands in need, and which are known to pass from that neutral country to the enemy, is by itself an element of proof on which the prize court would be justified in acting, unless it is rebutted by evidence to the contrary.⁴⁴

Unlike the British in the Civil War, the United States never denied that Great Britain was justified in cutting off her own exports, for one of this country's principal complaints was that the British allowed their own goods to go to the northern neutrals while they stopped similar American goods.⁴⁵ On the topic of bonding shipments against re-export to the enemy, there exists the sharpest contrast between the British in 1862 and the Americans in 1915; instead of complaining of the exaction of bonds, the United States en-

⁴² U. S. For. Rel., 1862, pp. 305-306.

⁴³ *Ibid.*, 1915, Supp., pp. 301-302.

⁴⁴ *Ibid.*, 1916, Supp., p. 376.

⁴⁵ *Ibid.*, 1915, Supp., pp. 449, 455, 479, 581-582.

tion of persons and mails. Mention of the interception of persons at once calls to mind the Civil War crisis over the *Trent*. When Captain Wilkes removed Mason and Slidell from the British mail packet, he provoked a storm in Anglo-American relations. Though the removal was unauthorized and unjustified, it was so popular that Seward was under the necessity of putting up some kind of defense. He took his stand on the ground that Mason and Slidell were contraband, but declared that the only precedents which could justify their removal from a neutral ship were British impressments. He, therefore, surrendered the men instead of sacrificing America's historic position.⁵⁷ Like the British Law Officers, he maintained that Wilkes should have taken the ship into port instead of removing the men.⁵⁸ Russell, in turn, accepted the surrender, but demolished Seward's argument that men or despatches on a neutral vessel bound for a neutral destination could be contraband of war.⁵⁹ Before 1908, the *Trent* affair was commonly looked upon as marking the abandonment by Britain and other countries of the claim of right to remove non-military persons from neutral ships. Some writers even considered that it put an end to the removal of military persons.⁶⁰ The Declaration of London, however, provided that persons actually embodied in the armed forces of the enemy might be removed from neutral ships without bringing the vessels into port.⁶¹

When the World War broke out, controversy soon arose. In November, 1914, the French removed a German-born waiter named Piepenbrink from an American vessel plying Latin American ports, and the British detained him at Jamaica. The United States immediately cited the *Trent* correspondence and demanded his release. Piepenbrink was soon released as a favor without agreement as to the principle, and similar seizures and releases followed.⁶² Early in 1916 the British removed 38 persons from the *China* off the mouth of the Yangtze River. At first the British defended the seizure and differentiated it from that of Mason and Slidell by declaring that the persons captured were bound for neutral territory only to use it as a base from which to carry on hostile activities against the Allies.⁶³ The United States declared that there was a plain and definite rule that "only military or naval persons

⁵⁷ Sen. Doc. No. 8, 37th Cong., 2d sess., pp. 4-13.

⁵⁸ James P. Baxter, 3d, "Some British Opinions as to Neutral Rights, 1861-1865," this JOURNAL, Vol. 23 (1929), p. 519.

⁵⁹ U. S. For. Rel., 1862, pp. 245-246.

⁶⁰ John Bassett Moore, Digest of International Law (8 vols., Washington, 1906), Vol. VII, p. 769.

⁶¹ The London drafting committee declared that reservists were not to be considered military persons. See Art. 47 and Report of Drafting Committee, Scott, *op. cit.*, p. 163. The British and French abandoned this part of the Declaration in November, 1914. U. S. For. Rel., 1916, Supp., p. 633.

⁶² *Ibid.*, 1915, Supp., pp. 744, 747, 748, 752-753, 755.

⁶³ *Ibid.*, 1916, Supp., p. 635. The British forgot that in 1862 they had cited Sir William Scott in *The Caroline* to the effect that the enemy might have hostile designs in the neutral state but that the belligerent should place its reliance upon the neutral. *Ibid.*, 1862, p. 249.

may be removed from neutral vessels on the high seas." It said that this rule was expressly invoked by the British and acted upon by the United States in the *Trent* and that the case of the *China* was exactly similar to that of the *Trent*.⁶⁴ The British first promised to release the prisoners from the *China*, but later began to hedge, saying that the pledge "was given under the impression that none of the persons who were to be released were of military age and character. If the facts had been known, the promise would not have been made."⁶⁵ The United States refused to admit that these facts changed the legal situation, and declared that up to the Declaration of London no person could be removed from a neutral vessel without bringing it in for adjudication.⁶⁶ After eight months, the men were released as a favor to the United States, not as a concession of principle. The *Trent* case was subjected to minute dissection by both sides, but the Americans were unable to get the British to agree that the *Trent* and the *China* were similar cases or that the right to remove persons from neutral ships was strictly limited as the United States contended. During a discussion which continued even after the United States entered the war, the British admitted that during the nineteenth century the Anglo-American practice had been not to remove enemy persons without placing the vessels on which they were traveling in the prize court, but declared that they had modified "the practice previously followed . . . largely out of regard for the interests of neutral shipping."⁶⁷ It is clear, therefore, that the *Trent* was a Civil War precedent which counted for very little during the World War.

The fate of Civil War precedents on mails was even more dismal. In August, 1862, Seward issued instructions to Welles, Secretary of the Navy, that captured mails were to be handed over intact to the consul of the Power concerned, who would examine them and return whatever was contraband or evidence. Instead of falling in with this suggestion, the British asked "that all mail bags, clearly certified to be such, shall be exempt from seizure or visitation, and that some arrangement shall be made for immediately forwarding such bags to their destination in the event of the ship which carries them being detained."⁶⁸ In reply Seward assured them that mail bags would not be opened.⁶⁹ Welles, however, did not heed Seward's instructions

⁶⁴ *Ibid.*, 1916, Supp., p. 637. H. W. Malkin, in "The *Trent* and the *China*," British Year Book of International Law, Vol. V (1924), p. 73 n., declares that the *Trent* correspondence did not suggest a rule permitting the removal of military and naval persons and no others. The furthest he goes is to say that some commentators deduced from the *Trent* a rule that no persons could be removed without bringing the vessel in, and that British opinion favored this view. *Ibid.*, p. 70.

⁶⁵ U. S. For. Rel., 1916, Supp., pp. 642 and 651.

⁶⁶ *Ibid.*, p. 673.

⁶⁷ *Ibid.*, 1917, Supp. 1, pp. 530-531.

⁶⁸ This account follows Baxter, "Some British Opinions," *loc. cit.*, pp. 523-527. The reference for the quotation above is given as North America No. 10 (1863), Russell to Stuart, Oct. 10, 1862.

⁶⁹ Seward also wrote: "This instruction, however, will not be deemed to protect simulated

insisting that only military and naval persons may be removed. Certainly, if the United States could think of neutral interests in the heat of the Civil War, it is capable of defending them now. If it preserves what was not frittered away in the World War, it may even lay the groundwork for better recognition of neutral rights.

RIGHTS AND DUTIES UNDER INTERNATIONAL LAW

AS AFFECTED BY THE UNITED STATES NEUTRALITY ACT AND THE
RESOLUTIONS OF PANAMA

BY QUINCY WRIGHT

Of the Board of Editors

(While recognized members of the community of nations are bound by the established rules of international law without any explicit act of acceptance, they cannot become bound by new rules without express or implied consent.¹) International law and municipal law have different sources and sanctions, consequently a state's municipal law cannot be taken as the measure of either its rights or its obligations under international law.²

These propositions, while generally accepted, are not always easy to apply. In practice, the relations of international law and municipal law are numerous and complicated.³ This is particularly true when problems of neutrality are being considered, because of the relationship between a neutral's duty of impartiality and its municipal regulations. The influence upon general international law of treaties or declarations among a limited number of states presents a similar problem. This problem can be illustrated by considering the influence upon rights and duties under international law of the American Neutrality Act of November, 1939,⁴ and the Panama Resolutions of October, 1939.⁵

(The American Neutrality Act makes it illegal, with certain exceptions especially in regard to American Republics, for United States vessels to trade with belligerents, to be armed, or to proceed through combat areas proclaimed by the President; for any persons to export from the United States to a belligerent goods in which an American has title; for any American citizen to travel on a belligerent vessel or to proceed through combat areas proclaimed by the President; for any person in the United States to deal in securities of, or to extend loans or credits to, a belligerent government, corporation or national, or to solicit contributions on behalf of a belligerent government or its agent. (The President is given authority to prohibit or regulate entry into United States ports of belligerent submarines, armed merchant vessels and vessels suspected of supplying warships at sea. A

¹ H. A. Smith, *Great Britain and the Law of Nations*, Vol. 1, pp. 12-13.

² Harvard Research in International Law, *Draft Convention on Responsibility of States*, Art. 2, this JOURNAL, Spec. Supp., Vol. 23 (1929), p. 142 ff.; Q. Wright, *Mandates under the League of Nations* (Chicago, 1930), p. 283.

³ Q. Wright, "International Law in its Relation to Constitutional Law," this JOURNAL, Vol. 17 (1923), p. 234 ff.

⁴ This JOURNAL, Supp., Vol. 34 (Jan., 1940), p. 44 ff.

⁵ *Ibid.*, p. 1 ff.

This legislation clearly cannot reduce the established rights of belligerents under international law nor impose new duties upon them. In general, it indicates no attempt to do so, since it imposes duties upon American nationals or vessels, or upon foreign persons or vessels within American territory, over which the United States has the right to exercise jurisdiction under international law.

There appears, however, to be an exception in Section 9 which exempts from application of the Act "any American republic engaged in war against a non-American state or states, provided the American republic is not co-operating with a non-American state or states in such war." A belligerent has a right under international law to demand legal impartiality from neutrals,⁶ but this provision declares explicitly that the United States, when neutral, will discriminate between the belligerents in certain wars.⁷

Another possible exception is the provision in Sections 10 and 11 authorizing prohibition or regulation of the entry into American ports of armed merchant vessels, submarines, or vessels suspected of serving as auxiliaries to warships at sea. It is not believed, however, that such regulations, if impartial in form, encroach upon existing rights and duties of belligerents. "Belligerents," according to the Thirteenth Hague Convention (Art. 1), "are bound to respect the sovereign rights of neutral Powers," and such prohibition or regulation of belligerent vessels in port would be within the neutral's sovereignty. A belligerent does not have a right to a twenty-four hour or any other length of sojourn for its ships in neutral waters. Such sojourn is a privilege which the neutral may grant, withhold or regulate. While doubtless the neutral's classification must be reasonable, the distinction between surface warships, submarines, armed merchant vessels and vessels suspected of serving as auxiliaries to warships is a widely accepted and inherently reasonable classification.⁸ This provision grants the President authority to restrict sojourn, but not to extend it beyond what international law permits, though it has been alleged that, in practice, the rights given to armed merchant vessels in ports have been too extensive.⁹

Does this legislation reduce the rights of the United States under international law, or increase its obligations? The preamble to the Act explicitly denies such an intention. It says:

The United States, desiring to preserve its neutrality in wars between

⁶ Harvard Research Draft Convention on Neutrality, Art. 4, this JOURNAL, Supp., Vol. 33 (1939), p. 232.

⁷ This exception may have been made in view of certain of the Pan American conventions, but the old rule which excepted the application of preëxisting treaties from the requirement of impartiality is no longer recognized. *Ibid.*, pp. 233-234.

⁸ Harvard Research Draft Convention on Neutrality, Arts. 27, 28, *loc. cit.*, pp. 432, 435. Deak and Jessup, A Collection of Neutrality Laws, Regulations and Treaties of Various Countries (Washington, 1939), contains numerous regulations on auxiliaries (Vol. 2, p. 1253), armed merchant vessels and submarines in neutral ports. (See index.)

⁹ See E. M. Borchard, this JOURNAL, Vol. 34 (Jan., 1940), p. 107 ff.

foreign states and desiring also to avoid involvement therein, voluntarily imposes upon its nationals by domestic legislation the restrictions set out in this joint resolution; and . . . by so doing . . . waives none of its own rights or privileges, or those of any of its nationals, under international law, and expressly reserves all the rights and privileges to which it and its nationals are entitled under the law of nations. . . .

Furthermore,

The United States hereby expressly reserves the right to repeal, change or modify this joint resolution or any other domestic legislation in the interests of the peace, security or welfare of the United States and its people. . . .

Secretary Hull had already taken a similar position with respect to the neutrality act in effect at the beginning of the war. On September 14 he said:

The Government of the United States has not abandoned any of its rights as a neutral under international law. It has, however, for the time being prescribed, by domestic legislation, certain restrictions for its nationals which have the effect of requiring them to refrain from the exercise of privileges which, but for such legislation, they would have the right to exercise under international law, such as the right to travel on belligerent vessels, to make loans and extend credit to belligerent governments, etc. These restrictive measures do not and cannot constitute a modification of the principles of international law but rather they require nationals of the United States to forego, until the Congress shall decide otherwise, the exercise of certain rights under those principles.¹⁰

This distinction between the "abandonment of rights" and "restriction upon the exercise of rights" had been emphasized by Secretary Hull in his letter to Senator Pittman and Representative Bloom on May 27, 1939, advocating certain amendments to the Neutrality Act.¹¹

While it is undoubtedly true that domestic legislation cannot reduce the state's obligations under international law, the converse is not true. Such legislation may increase the state's obligations. Thus, if a state legislates to accord new civil rights to its nationals, or new procedures for protecting their rights, the state is under an international obligation to extend these advantages to resident aliens. National law is a measure of the resident aliens' civil rights so long as that law does not fall below the international standard.¹² If a belligerent proclaims days of grace or other exemptions from capture beyond the strict requirements of international law, by such proclamation it assumes an international obligation to apply the benefits of such a self-denying ordinance, at least until it is formally repealed, to the nationals even of enemy states. In recognition of this, the proposed International Prize Court Convention of 1907 gave that court jurisdiction of enemy claims "based upon the allegation that the seizure had been effected

¹⁰ See Department of State Bulletin, Sept. 16, 1939, Vol. I, p. 245.

¹¹ Department of State Press Releases, June 3, 1939, Vol. XX, p. 475.

¹² Harvard Research Draft Convention on Responsibility of States, Art. 5, this JOURNAL, Spec. Supp., Vol. 23 (1929), p. 147.

in violation . . . of an enactment issued by the belligerent captor." (Art. III.)

This principle is especially applicable in the case of neutrality legislation because of the neutral's general duty of impartiality. The neutral must enforce its own regulations in all cases until they are formally repealed, under penalty of subjecting itself to belligerent protest or reprisal on the score of partiality.¹³ Furthermore, it cannot change its regulations except for the purpose of better protecting its rights and interests as a neutral.¹⁴ National neutrality legislation thus becomes a measure of the neutral's international obligations so long as that legislation is above the standard required by international law. This position has not always been recognized. Thus, on January 7, 1916, Secretary Lansing wrote to Ambassador Bernstorff:

If the municipal statutes of the country should be in advance of the requirements of international law, I understand that it is not for a foreign government to protest against their infraction so long as the infraction does not extend to the law of nations and so long as the municipal laws are impartially administered.¹⁵

While this seems to deny the belligerent's right to demand application of the municipal law standards, a careful reading indicates that in fact the last qualification in large measure negatives the original assertion. Any tolerated infraction of a neutrality regulation would be evidence that the regulation is not "impartially administered." Thus, for example, in the absence of any legislation, American bankers could make loans to all belligerents at discretion, but, under the present law, it is believed Great Britain could properly protest if the United States neglected to enforce Section 7 of the Neutrality Act in the case of a loan to Germany. That neglect would be evidence of a partial administration of the law. Thus, to say that a belligerent can object to a partial administration of national legislation is the same thing as to say that it can demand due diligence in the enforcement of the law in every case.

The neutral may of course repeal or change its legislation, but, according to the Hague Convention, only "in case experience has shown the necessity for such change for the protection of the rights of that Power." The Draft of the Harvard Research in International Law allows more liberty to the neutral, permitting changes "for the purpose of better safeguarding its rights and interests as a neutral or for better fulfilling its duties as a neutral."¹⁶ A substitute regulation must of course be up to the standards required by international law.

It has been asserted that changes may not relax existing regulations,

¹³ "It is for neutral Powers an admitted duty to apply these rules impartially to the several belligerents." Hague Convention XIII, 1907, preamble, par. 5.

¹⁴ *Ibid.*, par. 6; Harvard Research Draft Convention on Neutrality, Art. 13, *loc. cit.*, p. 316.

¹⁵ U. S. Foreign Relations, 1915, Supp., p. 818.

¹⁶ Draft Convention on Neutrality, Art. 13, *loc. cit.*, p. 316.

though they may augment them, but this suggestion does not accord with either practice or principle. A neutral might very well find that its regulations were so extensive as to prevent impartial administration. In this case it might be not only its right but its duty to relax the regulations sufficiently to assure their proper administration. A neutral's regulations must of course be impartial in form, and this implies that classifications must be reasonable. It is clear, however, that belligerents cannot complain of neutrality regulations on the ground of inequality in effect upon the war, or of assumed discrimination in officially undisclosed motives of enactment. There is no duty of either people or government of a neutral state to equalize the fortunes of war between belligerents nor to be impartial in opinion. Neutral regulations must be judged by the formal impartiality of phraseology, the reasonableness of classifications, and the official statement of motives. These principles have been observed in practice. While changes of their regulations by neutrals during war have been very common, complaints in regard to such changes have been rare.¹⁷

Thus, while a neutral may make regulations in excess of the requirements of international law, and may change such regulations during the war, it is under an international obligation to enforce them effectively so long as they are law.

Does a belligerent have a right to assist the neutral in enforcing the latter's regulations? Napoleon's Bayonne decree of April 17, 1808, in response to the American embargo, sequestered American vessels in French ports on the ground "that no vessel of the United States can now navigate the seas without infracting a law of the said state and thus furnishing a presumption that they do so on British account or in British connection."¹⁸ To this the United States replied that vessels which had left the United States in violation of the embargo had

committed an offense against their country but none against foreign Powers. They were not disfranchised by the act. They were entitled to the protection of their Government and it had a right to inflict on them the penalty which their conduct exposed them to. The Government of France could withdraw them from neither of these claims.¹⁹

The recent statements by Secretary Hull, and by Congress in the preamble to the Neutrality Act, seem to take a similar position, and to assert that the United States may protest if American ships should be interfered with by

¹⁷ Draft Convention on Neutrality, Art. 13, *loc. cit.*, p. 316 ff.; Clyde Eagleton, this JOURNAL, Vol. 34 (Jan., 1940), p. 99 ff.; Charles Warren, "Congress and Neutrality," in Neutrality and Collective Security (Q. Wright, ed., Chicago, 1936), pp. 131-134.

¹⁸ Am. State Papers, For. Rel., Vol. 3, p. 291.

¹⁹ Monroe, Sec. of State, to Joel Barlow, Minister to France, July 26, 1811, *ibid.*, p. 511; C. R. Fish, American Diplomacy (1923), p. 166; W. A. Phillips and Arthur H. Reed, The Napoleonic Period, in Jessup, ed., Neutrality its History, Economics and Law, Vol. 2, p. 180; Q. Wright, Enforcement of International Law through Municipal Law in the United States (1916), p. 124.

belligerents contrary to general rules of international law, even if found in barred zones or trading with a belligerent country in violation of the American Neutrality Act.

This position must be considered in relation to the duty of the United States effectively to enforce its national legislation. Suppose, for example, that the United States persistently enforced its legislation with respect to American vessels attempting to depart for Great Britain, but not with respect to such vessels departing for Germany. Might not Great Britain enforce against such of the latter vessels as it could catch penalties as severe as those which the United States was enforcing against vessels attempting to depart for Britain? Such behavior might be considered legitimate retaliation because of the breach of obligation involved in the American negligence in enforcing its own law. The American law might be taken as the measure of the right of the belligerent with respect to persons or ships evading that law.

The problem is doubtless controversial, and the question of whether the United States had failed to exercise "due diligence" to enforce its laws might be involved.²⁰ It would seem, however, that the belligerent's argument would be stronger than that made by both Great Britain and Germany during the course of the World War, namely, that they were entitled to adopt retaliatory measures adverse to the neutral rights of the United States, because of the inability of the United States effectively to defend those rights against the enemy's encroachments.²¹ While it may be doubted whether a belligerent can allege a neutral's negligence in pursuing its rights as a ground for retaliation, it would appear that it can consider a neutral's negligence in fulfilling its obligations as such a ground,²² and a neutral seems to be under an international obligation effectively to enforce its own neutrality legislation. It is, therefore, doubtful whether the United States could effectively protest in behalf of an American ship which had become involved in difficulties with the belligerents as a result of its violation of the American Neutrality Law.

Effective protest would be even more difficult in support of neutral rights in the abstract, the exercise of which the United States has renounced. The Harvard Research Draft on Neutrality suggests that:

every neutral State has a direct interest in the observance by belligerents of the law defining neutral rights, and a violation by a belligerent of a neutral right of one neutral State constitutes a violation of a neutral right of all neutral States.²³

²⁰ See Harvard Research Draft Convention on Responsibility of States, Art. 14, this JOURNAL, Spec. Supp., Vol. 23 (1929), p. 196.

²¹ German note to United States, Feb. 16, 1915, Department of State, European War, No. 1, p. 57; *The Stigstad*, [1919] A. C. 279; *The Leonora*, [1919] A. C. 974; H. W. Briggs, *The Law of Nations* (New York, 1938), p. 886 ff.

²² *The Brig General Armstrong* (1852), Moore, *Int. Arb.*, Vol. 2, p. 1094; Briggs, *op. cit.*, pp. 877 ff., 885 ff.

²³ Art. 114. This JOURNAL, Supp., Vol. 33 (1939), p. 788.

The solidarity of neutral interests has been asserted in the Argentine Anti-War Treaty and was exemplified in the protest by various European neutrals in the case of *The Trent*.²⁴ This principle has been asserted in several Pan American conventions and resolutions, most recently in the Ninth Panama Resolution of October, 1939, by which the American Republics declared:

That they consider the violation of the neutrality or the invasion of weaker nations as an unjustifiable measure in the conduct and success of war; and that they undertake to protest against any warlike act which does not conform to international law and the dictates of justice.²⁵

Yet it might be difficult for the United States to protest effectively in behalf of a right which it had forbidden its own nationals to exercise, and which it thus appeared to hold of minor importance.

During the present war, in the zone prohibited to American shipping and travel, belligerents have destroyed numerous ships and nationals of neutral Powers through the use of mines, submarines and airplanes in a manner contrary to international law, in some cases violating neutral territorial waters. They have ignored the protests of the injured governments. The United States has not had occasion, because of its law, to protest in behalf of its own ships or nationals in those waters, and has not seen fit to protest in behalf of neutral rights in general. (Neutral rights have suffered in the past in wars involving many of the great Powers, but one wonders whether respect for law would have degenerated so rapidly if the one great neutral, whose intervention in the war might be feared by the belligerents, had not barred itself by its own legislation from direct injury and from effective protest.) A policy devoted primarily to avoiding war may so encourage lawlessness that, as Grotius said, it will "cut away the bulwarks which safeguard the state's own future peace."²⁶

The United States has presented a number of protests to Great Britain in regard to seizures of mails and other incidents occurring outside the barred zone, but so far as the writer is aware, has made no protest to Germany, and in view of the limitation of German naval action to barred zones, few direct occasions for such protests are likely to arise. The discrimination involved in this situation was noted by the British Government, replying to American protests regarding treatment of the mails, on January 17, 1940. Said this note:

The German naval authorities have destroyed without previous warning or visit in defiance of the rules of war and of obligations freely entered into, the *S. S. Yorkshire*, the *S. S. Dunbar Castle*, the *S. S. Simon Bolivar*, and the *S. S. Terukuni Maru*, all of which are known to have been carrying mails to or from neutral countries, with as little regard for the safety of the neutral correspondence on board as to the lives of the inoffensive passengers and crew. Yet His Majesty's Government are

²⁴ This JOURNAL, Supp., Vol. 33 (1939), p. 790.

²⁵ This JOURNAL, Supp., Vol. 34 (Jan., 1940), p. 15.

²⁶ The Law of War and Peace, Proleg., Sec. 18.

not aware that any protest regarding this destruction of postal correspondence has been made to the German Government.²⁷

The sixteen resolutions approved by the consultative meeting of Foreign Ministers of the American Republics at Panama in October, 1939, dealt mainly with neutrality.²⁸ Measures were proposed for legal (I, VIII, X), economic (III, XIII) and political (IV, XII) coöperation among the American Republics during the period of neutrality. There were also declarations expressing allegiance to international law and morality, and denouncing resort to force, treaty violation, violation of neutral rights (IX), inhumanity in war (VI), and anti-democratic ideologies (XI). A resolution was devoted to a tribute to the liberator Simon Bolívar (II), and another provided for immediate consultation in case of transfer of sovereignty of an American area under the jurisdiction of a non-American state (XVI).²⁹

Most important for the present study, however, are Resolutions V, VII, XIV, and XV. The General Declaration of Neutrality of the American Republics (V) "reaffirmed the status of general neutrality of the American Republics, it being left to each one of them to regulate in their individual and sovereign capacities the manner in which they are to give it concrete application"; asserted an intention "to have their rights and status as neutrals fully respected and observed by all belligerents and by all persons who may be acting for or on behalf of or in the interest of the belligerents"; and declared, in eleven paragraphs, the "standards recognized by the American Republics applicable in these circumstances." These standards, which in general resemble the established principles of neutrality as laid down in the Hague and other conventions, were to be enforced as uniformly as possible. For this purpose the American Republics agreed to maintain close contact and to establish for the duration of the European war an Inter-American Neutrality Committee.

The resolution on contraband of war (VII) opposed the putting of food-stuffs and clothing intended for civilians on contraband lists, approved credits for facilitating trade in such commodities, and authorized the Neutrality Committee to study and recommend regarding "the commercial situation of raw materials, minerals, plant or animal, produced by the American Republics."

These two resolutions, in manifesting the disposition of a group of neutrals to insist upon belligerent acceptance of their interpretation of the rights of neutrals under international law, resemble the armed neutralities of 1780

²⁷ Department of State Bulletin, Jan. 27, 1940, Vol. II, p. 92.

²⁸ This JOURNAL, Supp., Vol. 34 (Jan., 1940), p. 1 ff.

²⁹ The "understanding" was added that "this resolution shall not apply to a change of status resulting from the settlement of questions now pending between non-American states and states of the continent." The Argentine and Guatemalan delegations made reservations concerning their respective claims to the Malvinas (Falkland) Islands and portions of British Honduras.

and 1800, with the important difference that any direct use of armed force by the neutrals for this purpose is discouraged. It is to be observed that, while in general the principles of neutrality declared have been accepted by general international law, this is not true in all cases.

The Declaration of Panama (XIV) asserts that:

As a measure of continental self-protection, the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea or air.

A zone averaging 300 miles around the American continents, except Canada, is then defined, and the governments agree to "endeavor, through joint representation" to the belligerents, to secure their compliance with the Declaration, "without prejudice to the exercise of the individual rights of each state inherent in their sovereignty"; to "consult together to determine upon the measures which they may individually or collectively undertake" to secure the observance of the Declaration; and,

during the existence of a state of war in which they themselves are not involved, may undertake, whenever they may determine that the need therefor exists, to patrol, either individually or collectively, as may be agreed upon by common consent, and in so far as the means and resources of each may permit, the waters adjacent to their coast within the area above defined.

Resolution XV requests the President of Panama to transmit this Declaration to the European belligerents. These declarations are all carefully drawn so as to avoid either reducing the rights of the participating American Republics under international law or increasing their obligations. The declarations are not included in a ratified treaty but in "resolutions" of a "consultative meeting." The Buenos Aires Treaty of 1936 and the Declaration of Lima of 1938 authorized the consultation, but neither of these instruments conferred upon the consultants legal authority to bind the parties. Furthermore, the republics specifically reserved freedom to determine concrete applications of the principles asserted. The only commitment undertaken to enforce the principles is that of further consultation. With respect to the Declaration of Panama, certain of the republics appear to have understood that they were free to withdraw their support if the belligerents refused to accept the Declaration.²⁰

Do these resolutions reduce the rights of the belligerents under international law or increase their obligations? They appear to attempt to do so in two ways: (1) by asserting that certain principles are international law and profes-

²⁰ See statement in regard to Peru, New York Times, Feb. 19, 1940.

sing a determination to maintain them, even though some of these principles, such as those referring to the internment of merchant vessels, transfer of flag, and the admission to ports of defensively armed merchant vessels, are controversial;³¹ and (2) by asserting other principles which go beyond international law, such as those relating to contraband and to the 300-mile zone, but which they propose to maintain on grounds of moral, political or economic interests.³²

In principle it seems clear that a group of states cannot legislate for the world. The Declarations of Paris (1856) and of London (1909), while professing in the main to state accepted rules of international law, were asserted to bind only the parties *inter se*. In both cases the parties expressed the intention to gain accession by other states of the world, but it was recognized that these other states would not be bound until they had so acceded.³³ It would appear that the American Republics can, under international law, do no more, and this position has been asserted by belligerents in refusing to accept the Declaration of Panama.³⁴ In practice the accepted rules of neutrality have been applied by the American Republics in the case of the *Graf Spee* and other instances in which hostilities have occurred within the barred zone.³⁵ If the American Republics should go beyond the offer of voluntary accession to these resolutions, and attempt to apply the new principles against unwilling states, they will have to rely on policy and not on law,³⁶ and in such an effort they might find themselves acting in violation of international law.

Doubtless there is a right of protective jurisdiction beyond the three-mile limit,³⁷ but there is also a right to exercise belligerent powers of visit, search

³¹ Resolution V, par. 3, Secs. (h), (i), (j). Cf. Borchard, cited *supra*, note 9.

³² Resolutions VII, par. 1; XIV. The Brazilian Government defended the Declaration of Panama "as a complement of the Monroe Doctrine and the Declarations of Buenos Aires and Lima" and as "useful for its existence and that of the other Republics of America." (This JOURNAL, Supp., Vol. 34 (Jan., 1940), p. 19.)

³³ A. Pearce Higgins, *The Hague Peace Conferences and other International Conferences concerning the Laws and Usages of War* (Cambridge, 1909), pp. 2, 541, 565.

³⁴ See British, French, and German notes of Jan. 14, 23, and Feb. 16, 1940, in reply to protest of the American Republics of Dec. 23, 1939, on the *Graf Spee* incident. Dept. of State Bulletin, Feb. 24, 1940, Vol. II, p. 199 ff.

³⁵ Uruguay based its action on Hague Convention XIII.

³⁶ See G. G. Wilson, "The Law of Neutrality and the Policy of Keeping out of War," this JOURNAL, Vol. 34 (Jan., 1940), p. 89.

³⁷ See P. M. Brown, "Protective Jurisdiction", this JOURNAL, Vol. 34 (Jan., 1940), p. 112 ff. The Harvard Research Draft Convention on Neutrality (*loc. cit.*, pp. 343, 348) provides:

"Art. 18. A belligerent shall not engage in hostile operations on, under or over the high seas so near to the territory of a neutral State as to endanger life or property therein.

"Art. 19. A belligerent shall not permit its warships or military aircraft to hover off the coasts of a neutral State in such manner as to harass the commerce or industry of that State." But neither of these contemplated a distance from the coast approaching 300 miles. See this JOURNAL, Supp., Vol. 33 (1939), pp. 343-353, in which the inconclusive American-British correspondence of 1916 in regard to "hovering" is included.

and capture upon the high seas.³⁸ The respective limits of these rights, in the absence of a general convention, is to be judged by the application of international law in the circumstances of a particular case, and not by prior assertion of the area and scope of the protective right by one party to the controversy.)

(The assertion of the protective zone around the American continents, together with the renunciation by the United States of the exercise of neutral rights in European waters, suggests an expansion of the two-spheres aspect of the Monroe Doctrine.³⁹ Whereas formerly the doctrine dealt only with land areas in the Western Hemisphere, it is now proposed to extend it to the seas. Formerly the Monroe Doctrine was linked with a general assertion of freedom of the seas, but in its new form it has some resemblance to the doctrine of *Mare Clausum* asserted by Spain and Portugal in the sixteenth century, against which Grotius launched the principle of *Mare Liberum*.⁴⁰)

(This new departure may give additional emphasis to the outstanding contradiction of our time in which science, invention and humanism are shrinking the world and developing interdependence of all its parts, while nationalism, regionalism and continentalism are attempting to segment the land and waters of the world into self-contained compartments. Possible consequences to civilization of this contradiction deserve attention, but cannot be examined here.⁴¹)

³⁸ "A belligerent has the right of visit and search on and over the high seas and on or over territorial waters that are not neutral." Draft Convention on Neutrality, Art. 49 (1), *loc. cit.*, p. 530. Art. 1 of the Havana Convention on Maritime Neutrality of 1928 is similar. *Ibid.*

³⁹ A. B. Hart, *The Monroe Doctrine, an Interpretation* (Boston, 1916), p. 70; Q. Wright, "The Distinction between Legal and Political Questions with especial reference to the Monroe Doctrine," *Proceedings, American Society of International Law*, 1924, p. 61; *supra*, note 32.

⁴⁰ P. B. Potter, *The Freedom of the Seas* (London, 1924), p. 57 ff.

⁴¹ See Eugene Staley, *World Economy in Transition* (New York, 1939); Hans Speier and Alfred Kähler, *War in Our Time* (New York, 1939), especially Chaps. 5 and 6; Arnold J. Toynbee, *A Study of History*, (1939), Vol. 4, p. 133 ff.

REMOVAL OF ENEMY PERSONS FROM NEUTRAL VESSELS ON THE HIGH SEAS

By HERBERT W. BRIGGS

Of the Board of Editors

Early in the afternoon of January 21, 1940, the Japanese steamship Asama Maru, proceeding from Honolulu to Yokohama, was stopped at a point 35 nautical miles off the coast of Japan by a British man-of-war. The British warship boarded the Asama Maru, and, "claiming to act under a right in international law but without explaining in detail the reasons for its actions and without even disclosing its name," forcibly removed 21 of the 50 Germans on board.¹ The Japanese Government protested immediately (January 22) to the British Ambassador in Tokyo, saying in part:

It is already well known to the British Government that the Imperial Government, in accordance with universally recognized usage, has adhered to the principle that the subjects of one belligerent Power, whose delivery a second belligerent Power may demand on the high seas, are restricted to those actually embodied in the armed forces. In spite, however, of the fact that the attitude of Japan in this matter is well known, a British man-of-war, in the waters adjacent to Japan, has taken forcible measures described above against a Japanese vessel. The Japanese Government cannot but regard such British action as a serious, unfriendly act against Japan, and therefore, they attach greatest importance to the affair.

The Japanese Government cannot acquiesce in the measure taken by the British Navy, regarding which they demand the British Government to give them a full and valid explanation promptly. The Japanese Government hereby explicitly reserve in advance the right to demand delivery to them of detained Germans.

The memorandum concluded with a reference to the "great shock" the British action had given to public opinion in Japan, and the warning that "repetition of such an action in future would inevitably aggravate all the more the sentiment of the Japanese nation against Great Britain."²

Public opinion in Japan appears to have been greatly aroused, the grievance being regarded mainly as one of national prestige: the British action had taken place "only two hours' steaming from Yokohama when the whole Pacific was open."³ Rear Admiral Masao Kanazawa, Navy Department

¹ Masayuki Tani, Japanese Vice-Minister for Foreign Affairs, to Sir Robert Craigie, H.B.M. Ambassador in Tokyo, Jan. 22, 1940. British White Paper, Japan No. 1 (1940), Correspondence . . . regarding the removal of German Citizens from the Japanese Ship Asama Maru, Jan.-Feb. 1940 (Cmd. 6166); partially reprinted in The Times (London), Feb. 7, 1940, 10: 2-3.

² *Ibid.*

³ New York Times, Jan. 24, 1940.

spokesman, told reporters: "The issue is not the twenty-one Germans, but the fact that the affair occurred at Japan's front gate. In the Far East there is no war, only international commerce."⁴

(Matters were not improved when another Japanese liner, the *Tajuta Maru*, was subsequently reported halted between California and Honolulu by a British warship. When the latter discovered that the *Tajuta Maru* did not have on board German seamen from the scuttled liner *Columbus*, she was permitted to proceed "without being searched.")⁵

(On January 27 the British Government replied to the Japanese protest in a note which expressed profound regret, not for the seizure, but for "the interpretation put upon their action by the Imperial Japanese Government." The note explained that the exercise of the belligerent right of visit and search was not an unfriendly act, nor did it "imply any slight upon the honor or national dignity of the neutral state involved"; the fact that the *Asama Maru* was stopped so near Japan "was dictated solely by the necessities of the particular situation"), however, H. M. Government greatly regretted "that the present incident, occurring as it did so close to the capital, should have aroused such profound resentment in Japan."⁶

Turning next to the legal argument, the British Government state their understanding that the Japanese Government "do not dispute that certain categories of enemy nationals may legitimately be removed from a neutral vessel, but they contend that the persons removed in the present case do not fall within the categories in question. - This is accordingly the only legal issue between the two Governments to which the present case gives rise."

Referring to the Japanese statement that by "universally recognized usage" only persons "actually embodied in the armed forces" of the enemy may be removed from neutral vessels on the high seas, the British note questions the existence of such a rule, denies the authority of Article 47 of the unratified Declaration of London⁷ (on which, Mr. Tani informed Sir Robert Craigie orally, the Japanese Prize Instructions were based), and asserts that many former treaties limiting the removal of enemy persons from neutral vessels without prize proceedings to certain categories of persons, imply that a contrary practice existed and was recognized. "It will not be disputed," continues the note, "that the object of these treaties was to limit the exercise of an existing right or practice, and not to create a new one"; moreover,

... under modern conditions, where conscription laws impose a liability to military or naval service on all able-bodied males, it is obvious

⁴ New York Times, Jan. 26, 1940, 3: 1; The Times (London), Jan. 26, 1940, 8:7.

⁵ New York Times, Jan. 24, 1940.

⁶ Craigie to Arita, Jan. 27, 1940, British White Paper, *loc. cit.*

⁷ Art. 47 of the unratified Declaration of London of 1909 reads as follows:

"Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel."

that a right to remove "military persons" would be illusory if it did not cover individuals who, though not on the peace-time strength of their country's armed forces, are under a legal liability to serve and are actually on their way to take their place in the ranks. Such persons are precisely those who are likely to be found travelling on neutral ships in time of war. . . .

The question whether persons who, being under a legal liability to serve, are returning to their country to perform that obligation are technically "effectively in the service of the enemy" or "incorporés dans la force armée de l'ennemi" (the phrase employed in the Declaration of London) may depend on the terms of the conscription law of the country concerned, which in itself is sufficient to show how artificial is, in this connexion, any distinction between such persons and members of the peace-time strength. But it can hardly be seriously contended that the mere fact that such persons may not have actually joined the corps to which they are to belong carries the conclusion that they are not in the military service of the enemy, and the suggestion that they are not within the category of persons who may be removed from a neutral ship seems to result entirely from the interpretation which has been placed in some quarters on the terms of Article 47 of the Declaration of London. . . .

His Majesty's Government conclude therefore, that, assuming that a right to remove enemy nationals from neutral ships exists at all (and this is not disputed by the Imperial Japanese Government), it must include persons returning to their own country for the purpose of fulfilling the obligation of military service which is imposed upon them by law. This contention is strongly supported by the practice of the War of 1914-18. . . .

There is in any case, no doubt as to the view of the German Government on the point. Article 77 of the German Prize Ordinance of 1939 provides as follows:

- "(1) The passengers in captured vessels must be released.
- (2) The following are excepted:
 - (i) Members of the enemy armed forces.
 - (ii) Persons who are making the voyage in order to put themselves in the service of the enemy armed forces.
 - (iii) Agents of the enemy."

It remains to consider the position of the particular Germans who were removed from the *Asama Maru*. As to their liability to military service under German law, there is no doubt. Under Article 1 of the German Defence Law of May 21, 1935, "every German man is liable to compulsory military service," while under Article 4 compulsory military service lasts from the end of the eighteenth year to the end of the forty-fifth year, and under Article 6 this period can be extended in war and in special emergencies by the Reich War Minister. There are, moreover, special provisions relating to seamen. . . .

The note refers to the fact that the German Government were using "part of their scanty supplies of foreign exchange" in an "organized" and "expensive" attempt to return "German mercantile marine officers and men" from America to Germany via Japan and Siberia, and states that

"as almost the entire German mercantile fleet is laid up in port, it is obvious" that these technically trained men, some of whom have a "special knowledge of the Diesel engine," "are intended for service in the German Navy." Since the British Government were determined to put an end to German unrestricted submarine warfare, "they could not reconcile it with their obligations to their own countrymen, to say nothing of neutral interests, to risk innocent lives and shipping by allowing personnel to reach Germany which can be employed to perpetuate this menace."

The twenty-one Germans removed from the *Asama Maru* were referred to in the British note as "13 officers and 8 technical ratings," although the note nowhere asserts that they were actually embodied in the armed forces of the enemy. The note concludes with an assertion that British action "was justified by international law and practice."

A Tokyo despatch to the *New York Times* for January 31, 1940, reported: "There are indications that the Japanese are surprised by the strength of their position in international law. . . . But national dignity is still the governing factor."⁸ In any case, the Japanese reply of February 1 to the British note challenged the British view "that it is an established principle in international law that enemy nationals may be removed from a neutral ship on the high seas without any prize proceedings whatever," and advanced the view that "the removal of enemy nationals from neutral ships engaged in peaceful traffic on the high seas has essentially been regarded as illegal in international law."⁹ The Japanese reply noted that when, during the World War, the British "insisted that the persons liable to be removed from neutral ships were not limited to persons embodied in the armed forces of the enemy, but included persons who were reservists," the British justified their practice as retaliatory, but "the fact that it was considered necessary to use this as a pretext merely shows that the removal of persons other than those embodied in the armed forces of the enemy was not generally regarded as proper under international law."⁹ Adverting next to the British

⁸ New York Times, Jan. 31, 1940, 8: 2.

⁹ Arita to Craigie, Feb. 1, 1940, British White Paper, *loc. cit.* Compare the American position during the World War. On Nov. 3, 1914, the London Gazette had published the following notice: "In view of the action taken by the German forces in Belgium and France of removing, as prisoners of war, all persons who are liable to military service, H. M. Government have given instructions that all enemy reservists on board neutral vessels should be made prisoners of war. Foreign Office, November 1, 1914." U. S. Naval War College, *International Law Situations*, 1928, p. 91. When Sir Edward Grey referred to this notice as a justification for the removal of 38 enemy nationals from the American steamship *China*, Mr. Lansing replied: "The fallaciousness of this ground for repudiating the rule is manifest, for it amounts to saying that because a belligerent government undertakes to commit a reprehensible act in territory which it occupies, its enemy may violate the sovereignty of a neutral to commit a similar act." U. S. Foreign Relations, 1916, Supp., p. 637. Lansing to Page, April 22, 1916. Lauterpacht in his fifth edition of *Oppenheim, International Law*, Vol. 2 (1935), p. 704 n., comments: "The legality of this measure of reprisals by the Allies may well be doubted."

reference to Article 77 of the German Prize Ordinance of 1939, Mr. Arita suggests that the British note confuses

the question whether or not enemy nationals may be removed from neutral vessels engaged in peaceful navigation on the high seas, and the question whether or not passengers on a vessel which has been captured may be held as prisoners after examination by a prize court; and it must be pointed out that, as a matter of international law, the question whether even persons in military service liable to be held as prisoners may or may not be removed from neutral vessels engaged in peaceful navigation on the high seas is a matter for argument.

The Japanese Government concluded with a statement that British action in the *Asama Maru* incident was "not justifiable in international law," and earnestly requested the British Government to hand over the twenty-one men seized.

After a series of conversations with the Japanese Foreign Office, in which a compromise was arranged, Sir Robert Craigie replied ¹⁰ on February 5 that, although unable to accept the validity of the Japanese legal argument, the British Government had investigated "the training and antecedents" of the captured Germans and found that "some of them are relatively unsuitable for military service." The British Government, therefore, "while reserving all their legal rights," would release to the Japanese authorities nine of the men removed from the *Asama Maru*. The *quid pro quo* granted by the Japanese Government was stated in the House of Commons on February 6 by Prime Minister Chamberlain. After referring to British willingness to release the nine men "relatively unsuitable for military service," Mr. Chamberlain added:

Meanwhile the Japanese shipping companies have been instructed that they should in future refuse passage to any individual of a belligerent country who is embodied in the armed forces or who is suspected of being so embodied. While his Majesty's Government have maintained their view of the legal position in this matter, it is anticipated that such incidents as that in connexion with the *Asama Maru* will be avoided in future. (Hear, hear!) ¹¹

Diplomatic discussions of the removal of enemy persons from neutral vessels on the high seas have on more than one occasion been characterized by a confusion of two distinct but related issues, with the result that the belligerent and the neutral have often been arguing at cross-purposes. One issue has been whether a right of removal (as distinguished from a right to capture and adjudicate in prize a vessel carrying certain categories of enemy persons to a hostile destination) ever exists, even when a neutral vessel is

¹⁰ Craigie to Arita, Feb. 5, 1940, British White Paper, *loc. cit.*

¹¹ The Times (London), Feb. 7, 1940, 8: 2. See also editorial, *ibid.*, 9: 2, and report of Mr. Arita's statement to the Japanese Parliament, *ibid.*, 8: 2. Mr. Arita referred to the compromise as "though not yet a complete settlement, an important stage in that direction," and the British Government reserved the right to reply to the Japanese legal arguments "in due course." *Ibid.*, 10: 3.

transporting persons actually incorporated in the armed forces of the enemy to a hostile destination. A distinct question concerns what categories of enemy persons a belligerent is entitled to prevent a neutral vessel from transporting to a hostile destination.

The Japanese Government in the *Asama Maru* controversy was somewhat slow to raise the removal issue, but eventually challenged the alleged right in its note of February 1. Similarly in the case of the removal by the British of 38 enemy subjects from the United States steamship *China* on the high seas in February, 1916,¹² the United States failed at first to raise the removal issue. Mr. Lansing cabled Ambassador Page on April 22, 1916: "The rule is plain and definite—only military or naval persons may be removed from neutral vessels on the high seas."¹³ However, the United States memorandum of November 23, 1916, corrected this lapse, stating:

But even assuming that all of the persons taken from the S.S. *China* were of "military character," the Government of the United States does not admit that they may be arrested and seized on the high seas from an American vessel flying the American flag, for, as has heretofore been reiterated by the Government of the United States, such seizures are without justification in international law.¹⁴

In the same memorandum the United States specifically challenged¹⁵ the British assertion of March 16, 1916, that

the principle . . . that there are certain classes of persons who are not protected by a neutral flag on the high seas and may therefore without any invasion of the sovereign rights of the neutral be removed from a neutral ship is now generally admitted. The carriage of such persons may in some cases amount to unneutral service, rendering the ship liable to condemnation; but even when this is not so, the removal of such persons from a neutral ship by a belligerent does not justify any complaint by the neutral state concerned.¹⁶

In a subsequent memorandum of December 1, 1916,¹⁷ the opposition of the United States to the belligerent practice of removal was developed with great skill. Doubt was expressed "whether there ever existed among nations a practice, outside of convention, of removing certain classes of persons from neutral vessels on the high seas without bringing them in for adjudication." The treaties of the 17th, 18th and 19th centuries, in so far as they permitted removal of certain enemy persons,¹⁸ were not declaratory

¹² Cf. U. S. Foreign Relations, 1916, Supp., pp. 630-679. For previous and subsequent discussions of the issue, see *ibid.*, 1915, Supp., pp. 744-755, and *ibid.*, 1917, Supp. I, pp. 526-532. See also *ibid.*, The Lansing Papers, 1914-1920, Vol. I, pp. 309-311, 327-328.

¹³ *Ibid.*, 1916, Supp., p. 637. Italics not in original.

¹⁴ *Ibid.*, pp. 666-667. Enclosure in Lansing to Page, Nov. 23, 1916. ¹⁵ *Ibid.*, p. 664 ff.

¹⁶ *Ibid.*, p. 634. Grey to Page, March 16, 1916.

¹⁷ *Ibid.*, pp. 668-674. Enclosure in Lansing to Page, Dec. 1, 1916.

¹⁸ For a discussion of these treaties, see Harvard Research in International Law, Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, Art. 62, this JOURNAL, Supp., Vol. 33 (1939), p. 603 ff.

of contemporary or subsequent international law, but were exceptions to the general practice of nations. In a very able summary of British practice, as evidenced in instructions to naval officers, prize court proceedings, and diplomatic correspondence, the United States memorandum demonstrated that, apart from treaty, it had never been the practice of the British from 1718 to the London Naval Conference of 1908 "to remove persons, military or otherwise, from neutral ships on the high seas without bringing the ship itself into port for adjudication." The practice of the United States had been essentially the same.

On the point of removal the British Government eventually admitted to the United States "that during the greater part of the nineteenth century the practice of the two countries was not to remove enemy persons from neutral vessels on the high seas without placing such vessels in the prize court," but they felt that this "older practice" should be modified.¹⁹ In fact, the British practice of removal "is a modification which H. M. Government have adopted largely out of regard for the interests of neutral shipping," and

is so clearly to the general advantage that H. M. Government do not propose to modify it and send in the (neutral) vessel for adjudication before a prize court except in the case of a neutral country whose government may express a definite wish to that effect, and which may be prepared to come to some understanding that they will not look to H. M. Government to compensate the shipowners for the losses entailed.²⁰

The controversy ended on a note of high comedy. Mr. Lansing made the completely idiotic proposal that in view of the fact that the United States had entered the war and was now a co-belligerent with Great Britain, the practice of removal should be "contingent upon a mutual agreement allowing reciprocal action."²¹ Mr. Page solemnly replied that the British Government "are most willing . . . that United States warships should remove enemy subjects or agents from British ships if any such ships carrying persons of this description are encountered."²²

// The controversy over the separate issue of what categories of enemy persons a belligerent is entitled by international law to prevent a neutral vessel from transporting to a hostile destination can be stated more briefly. The position of the United States during the World War, and of Japan in the Asama Maru incident, that these persons are limited to those actually incorporated in the armed forces of the enemy, has centuries of precedents to support it.²³ (In its memorandum of December 1, 1916, to the British

¹⁹ U. S. For. Rel., 1917, Supp. 1, p. 531. Balfour to Page, May 31, 1917.

²⁰ *Ibid.*, pp. 531-532.

²¹ *Ibid.*, p. 529. Lansing to Page, April 23, 1917.

²² *Ibid.*, p. 529. Page to Lansing, May 31, 1917.

²³ Cf. generally, J. B. Moore, *A Digest of International Law*, Vol. VII, pp. 752-779; U. S. Naval War College, *International Law Situations*, 1928 (G. G. Wilson, ed.), pp. 73-108; Harvard Research Draft Convention, *loc. cit.*, p. 603 ff. See also J. W. Garner, *International*

Government, the United States, while rejecting the British practice of removal of certain persons from neutral vessels on the high seas, stated that even assuming, *arguendo*, that a right of removal existed, "it is demonstrable that such a practice was restricted to a single specific class of persons, to which enemy reservists and enemy agents or plotters do not belong."²⁴

Even the early treaties which authorized removal strictly limited it to persons actually in the service of the enemy. Furthermore, British declarations of war during the 18th century, British prize court decisions, and British proclamations of neutrality in 1861, 1870, 1894, 1898, and 1904 refer only to the transportation by neutrals of officers and soldiers as noxious. American practice was similar.²⁵ The memorandum continued:

Judging from these examples of British and American announcements and practice, it is clearly manifest that neither country ever considered any individuals as liable to apprehension (regardless of the treatment of the ship) except soldiers, officers, and other military persons in the actual service of the enemy, with the possible addition of civil officers "sent out on the public service of the enemy and at the public expense of the enemy," notwithstanding the fact that reservists have been known and recognized in military systems of Europe at least since 1870.²⁶

The British defense of extending the categories of noxious enemy persons was based partly on the ground of retaliation²⁶ and partly on the appeal to logic similar to that set forth in the *Asama Maru* correspondence above.²⁷

While rejecting the alleged retaliatory justification as completely unsound,²⁸ the writer might be willing to concede that there is some logic in the British position that enemy reservists traveling to join the enemy forces cannot be distinguished from men actually incorporated in the enemy armed forces.

The British, however, have not limited their practice to the seizure of actual reservists, but have so defined the term as to include "all persons liable to military service"²⁹ or "persons of military age or character."³⁰ As a matter of practice, the distinction between these all-embracing categories and all enemy nationals becomes slight. If logic is to be the criterion of the legality of belligerent pretension and neutral sacrifice, Professor Charles Cheney Hyde indicates the possible extent of belligerent pretension when he states:

Law and the World War (1920), Vol. 2, pp. 369-370, that Bentwich, Higgins, Dupuis, Bluntschli, Perels, Marquardsen, Lawrence, Kleen, Mountague Bernard, and many others take the view that reservists are not within the category of capturable persons, and "cannot lawfully be taken from a neutral vessel, and such carriage does not incriminate the vessel, unless the voyage is undertaken especially for their transport."

²⁴ U. S. For. Rel., 1916, Supp., p. 674.

²⁵ *Ibid.*

²⁶ See above, note 9.

²⁷ See above, pp. 250-251.

²⁸ See Harvard Research Draft Convention on Neutrality, Art. 23, *loc. cit.*, pp. 392-419.

²⁹ U. S. For. Rel., 1916, Supp., p. 654. Grey to Page, July 15, 1916.

³⁰ *Ibid.*, p. 651. Foreign Office Memorandum of June 28, 1916. ✓

There is strong probability that any enemy person of either sex if not under physical disability, and having a hostile destination, will offer some measure of direct aid to the State of allegiance after reaching its territory, regardless of the absence of any prior connection with its service as during the period of transit on the neutral ship.³¹

(The provisions of the early treaties³² and Article 47 of the unratified Declaration of London were evidently a compromise by which neutrals, to avoid the inconvenience of having their vessels captured for transporting enemy officers and soldiers, permitted removal of this strictly limited category of enemy persons. They were in no sense evidence of a preëxisting belligerent right of removal in any circumstances; nor were they evidence of a preëxisting belligerent right to seize all enemy subjects transported by neutrals.) Experience has shown, however, that the compromise is unworkable. Once having gained a treaty right of removal of persons actually incorporated in the enemy armed forces, belligerent pretensions took two forms: (1) they asserted a right of removal even in the absence of treaty (claiming that the exception had become the rule); and (2) they extended arbitrarily and without adjudication of the issue, the categories of removable persons.

It seems clear from a study of practice and precedent (including British practice prior to the World War) that, in the absence of treaty, there exists no legal right of removal of any enemy person from a neutral vessel on the high seas. It seems equally clear that the enemy persons whom a belligerent is entitled by international law to prevent a neutral vessel from transporting to a hostile destination are limited to those actually incorporated in the enemy armed forces. (The fact that during the World War the British, as an act of retaliation against German illegalities, removed about 3500 enemy subjects of military age from 64 neutral vessels,³³ and that other belligerents engaged in the same practice despite the protests of neutral governments, does not change the rule, nor does the inclusion in the current naval regulations of a few states³⁴ of clauses permitting a similar practice. (If the appeal to international law is to remain anything more than an additional weapon in the belligerent diplomatic arsenal, it cannot be admitted that rules crystallized by centuries of almost universal practice can be modified at the caprice or even the necessity of a hard-pressed belligerent.) The conclusion is, then, that the recent belligerent practice of removing enemy subjects at will from neutral vessels on the high seas—a practice which the British themselves have practically admitted is a modification of the rule of law³⁵—is without justification in international law. ✓

Granting that the rules of international law cannot lawfully be modified

³¹ C. C. Hyde, *International Law* (1922), Vol. 2, p. 642.

³² See above, note 18.

³³ L. F. Oppenheim, *International Law*, 5th ed. (Lauterpacht), Vol. 2 (1935), p. 704.

³⁴ Harvard Research Draft Convention, *loc. cit.*, pp. 617-618.

³⁵ U. S. For. Rel., 1917, Supp. 1, p. 531. Balfour to Page, May 31, 1917.

by a single state—or even a small group of powerful belligerents—to the detriment of other states, it is still proper to inquire whether the rule is in need of modification. The British argument as to the value of all men of military age to the enemy is valid, but the consequences drawn therefrom to the detriment of neutral rights indicate the need for adequate safeguards. Again, it is undoubtedly a disadvantage to the neutral ship-owner to have his vessel diverted and held for adjudication in prize for costly months. On the other hand, the advantages of a judicial determination of belligerent and neutral rights set forth by Secretary of State Seward in the *Trent* affair³⁶ are still valid and, in recent times, would appear to be an essential safeguard.

What concessions may safely be made by the neutral? The Harvard Research in International Law in its recent Draft Convention on Rights and Duties of Neutral States in Naval and Aërial War (Philip C. Jessup, Reporter) has proposed the following rule:

Article 62.

- (1) A belligerent may arrest on board an uncertified neutral vessel and hold as a prisoner of war:
 - (a) A person incorporated in the armed forces of the enemy;
 - (b) A person traveling to the territory of the enemy or to territory under enemy occupation, in order to join the armed forces of the enemy;
 - (c) A person of enemy nationality traveling as an agent of the enemy for the purpose of assisting its military or naval operations, provided he is not a member of a diplomatic mission or a person charged with a diplomatic function.
- (2) A person arrested under this article may be removed from the vessel on which he is found, or if the vessel is brought in for adjudication, may be brought into port on the vessel. If the neutral State whose flag the vessel flies, disputes the liability to arrest of the person concerned, the belligerent shall afford to the neutral State an opportunity to have the question promptly determined in a court of the belligerent.³⁷

This concession to belligerent pretensions is made, however, in connection

³⁶ "If there be no judicial remedy, the result is that the question must be determined by the captor himself on the deck of the prize vessel. Very grave objections arise against such a course. The captor is armed, the neutral is unarmed. The captor is interested, prejudiced, and perhaps violent; the neutral, if truly neutral, is disinterested, subdued, and helpless. The tribunal is irresponsible, while its judgment is carried into instant execution. The captured party is compelled to submit, though bound by no legal, moral, or Treaty obligation to acquiesce. Reparation is distant and problematical, and depends at last on the justice, magnanimity, or weakness of the State in whose behalf and by whose authority the capture was made. . . . I think all unprejudiced minds will agree that imperfect as the present judicial remedy may be supposed to be, it would be, as a general practice, better to follow it than to adopt the summary one of leaving the decision with the captor and relying upon diplomatic debates to review his decision." Seward to Lord Lyons, Dec. 26, 1861. 55 British and Foreign State Papers, 634-635.

³⁷ This JOURNAL, Supp., Vol. 33 (1939), p. 601.

with a scheme for certifying certain neutral vessels and abandoning uncertified neutral vessels largely to the tender mercies of belligerents, and appears to the writer to yield too much: it not only yields the point on *removal*—which is so liable to abuse—but it opens the door to presumptions of intent in paragraph (1) (b) and (c), as it is unlikely that any person traveling “in order to join” or “for the purpose of assisting” the enemy armed forces will admit it, if the penalty is imprisonment. It seems likely that presumptions of this intent in belligerent courts might lead to a result scarcely distinguishable from recent British practice. If removal is to be sanctioned, however, the requirement of a really impartial judicial hearing as to “the liability to arrest of the person concerned” would appear to be essential.

The Anglo-Japanese compromise in the *Asama Maru* incident is another possible formula, i.e., neutral vessels would be required, presumably by national legislation of the neutral, to “refuse passage to any individual of a belligerent country who is embodied in the armed forces or is suspected of being so embodied,” thereby gaining immunity from the belligerent practice of removal. This formula is along the lines of certain provisions of the United States Neutrality Act of 1939, and, to the writer, would seem preferable to acquiescence in the practice of removal. The principal interest of the neutral is certainly not the transportation of subjects of the belligerents; the neutral is primarily interested in freedom from vexatious interference with its shipping. This formula would impose no great hardship on the neutral and would probably satisfy belligerent requirements. In no case, however, should removal be sanctioned; and if it is impossible to prevent it, a determined effort should be made to secure an impartial judicial determination of the issues involved.

U

13

POSITIVISM, FUNCTIONALISM, AND INTERNATIONAL LAW

BY HANS J. MORGENTHAU

Assistant Professor of Law and Political Science, University of Kansas City

If an event in the physical world contradicts all scientific forecasts, and thus challenges the assumptions on which the forecasts have been based, it is the natural reaction of scientific inquiry to reexamine the foundations of the specific science and attempt to reconcile scientific findings and empirical facts. The social sciences do not react in the same way. They have an inveterate tendency to stick to their assumptions and to suffer constant defeat from experience rather than to change their assumptions in the light of contradicting facts.¹ This resistance to change is uppermost in the history of international law. All the schemes and devices by which great humanitarians and shrewd politicians endeavored to reorganize the relations between states on the basis of law, have not stood the trial of history. Instead of asking whether the devices were adequate to the problems which they were supposed to solve, it was the general attitude of the internationalists to take the appropriateness of the devices for granted and to blame the facts for the failure.² When the facts behave otherwise than we have predicted, they seem to say, too bad for the facts. Not unlike the sorcerers of primitive ages, they attempt to exorcise social evils by the indefatigable repetition of magic formulae. As the League of Nations was a failure, let us have another League. As the first and second Peace Conferences of the Hague did not succeed, let us have a third one. As arbitration never settled a political conflict which otherwise would have led to war, let us have more arbitration for the prevention of war. As the Disarmament Conference was a senseless waste of intellect and time, why not convoke another Disarmament Conference?

It is a strange paradox that the lay public has observed a much more sceptical and realistic, therefore scientific, attitude toward international law than the science of international law itself. The laymen were much quicker to recognize the gap between the rules of international law as represented by science, and the rules of international law as they exist in actual experience. The breakdown of the main bulk of post-World War international law has altogether destroyed public confidence in a science which, unmoved by what

¹As to this tendency, see Lancelot Hogben, *The Retreat from Reason* (Conway Memorial Lecture, London, 1936); Lynd, *Knowledge for What?* (Princeton, 1939).

²See Wild, "What Is the Trouble with International Law?" *Am. Pol. Sci. Rev.*, Vol. XXXII (1938), p. 479: "Too often in the past he has assumed the attitude that the world is out of step with his law, and too seldom has he considered the point that perhaps his science is partly to blame."

experience may show, invariably follows its preconceived pattern.³ This breakdown implies the practical refutation of the ideas which have determined the development of international law in the last half-century. Hence, the science of international law is now confronted with the alternative of maintaining the traditional pattern of assumptions, concepts and devices in spite of the teachings of history, or of revising this pattern and trying to reconcile the science of international law and its subject-matter, that is, the rules of international law as they are actually applied.⁴ The present writer has always held that only the latter way leads to theoretically correct and practically useful results. In the following paper the attempt will be made to reexamine the methodological assumptions with which the traditional science of international law starts. These assumptions are embodied in the positivist doctrine of law.

THE LEGAL PHILOSOPHY OF POSITIVISM

Positivist philosophy restricts the object of scientific knowledge to matters that can be verified by observation, and thus excludes from its domain all matters of an *a priori*, metaphysical nature.⁵ Juridic positivism transfers this delimitation into the legal sphere. The juridic positivist delimits the subject-matter of his research in a dual way. On the one hand, he proposes to deal exclusively with matters legal, and for this purpose strictly separates the legal sphere from ethics and *mores* as well as psychology and sociology. Hence, his legalism. On the other hand, he restricts his attention within the legal sphere to the legal rules enacted by the state, and excludes all law whose existence cannot be traced to the statute books or the decisions of the courts. Hence, his *étatist* monism. This "positive" law the positivist accepts as it is, without passing judgment upon its ethical value or questioning its practical appropriateness. Hence, his agnosticism. The positivist

³ Professor Quincy Wright could report in 1930 (Research in International Law since the War, p. 25): "Of the twenty jurists with whom the writer has corresponded, only two betrayed a note of pessimism at the prospects, and that in both cases was qualified."

⁴ Such reexamination is called for by many writers; see, for instance, Philip Marshall Brown, this JOURNAL, Vol. 33 (1939), p. 149; Djuvara, *Recueil des Cours de l'Académie de Droit International* (cited hereafter as *Hague Recueil*), Vol. 64 (1938), p. 485; Hudson, Proceedings of the 2nd, 3rd, and 5th Conferences of Teachers of International Law (Washington, 1925, 1928, 1933), pp. 86 *et seq.*, 72, 94, 95, respectively; MacKenzie, Proceedings of the 6th Conference of Teachers of International Law (Washington, 1938), p. 109; Friedman, "The Disintegration of European Civilization and the Future of International Law," *Modern Law Review*, Vol. 2 (1938), p. 213.

⁵ For the characteristics of positivist philosophy, see Comte, *Discours sur l'esprit positif* (Paris, 1844), p. 41 *et seq.*; Mill, *Auguste Comte and Positivism* (London, 1866), p. 6 *et seq.*; see especially, the excellent article, "Positivism," by Ruggiero in *Encyclopedia of the Social Sciences*, Vol. 12, p. 260.

The most penetrating contemporaneous criticism of positivist science is to be found in Mortimer J. Adler, *What Man Has Made of Man* (New York, 1937), especially pp. 28, 87, 97, 131, 132, 158 *et seq.*, 192, 233, 238 *et seq.*

cherishes the belief that the "positive" law is a logically coherent system which virtually contains, and through a mere process of logical deduction will actually produce, all rules necessary for the decision of all possible cases. Hence, his system worship and dogmatic conceptualism.⁶

The historic importance of the positivist school of jurisprudence for the science of law was fourfold. First, positivism accepted the breakdown of the great metaphysical systems of the eighteenth and the early nineteenth centuries and the resulting decadence of metaphysical jurisprudence as an established fact. It endeavored to save the scientific character of jurisprudence by eliminating from it all metaphysical elements, thus separating it from the discredited doctrines of natural law. In the second place, positivism recognized that the subject-matter of jurisprudence was the law and nothing but the law, and that neither non-legal subjects nor non-legal considerations could have any place in it. Furthermore, legal positivism learned from the positivist movement in philosophy and the natural sciences that scientific objectivity is dependent upon an object intelligible in experience, and a method aimed at knowledge, not at evaluation. Finally, the great legal codifications of the European continental countries and the Anglo-American statutory law found in positivism a technique of interpretation and representation. This technique fulfilled its purpose satisfactorily as long as the social and political philosophy of the statutes, either directly expressed by them or indirectly derived from them by way of logical deduction, was sufficient to meet the economic and social needs as well as the political demands and ethical requirements of a given society at a given historical moment.

To be sure, this correspondence between the statutes and the standards of society has never existed completely; even under stationary conditions there will always be a marginal sphere which does not allow the mere logical subsumption of a given case under statutory law without violating the standards of society. In order to satisfy the positivist assumptions of the logical completeness of the legal order and at the same time meet the standards of society, these standards were first to be read into the statutes from

⁶ For the characteristics of juridic positivism, see Finch, *Hague Recueil*, Vol. 53 (1935), p. 557, and *The Sources of Modern International Law* (Washington, 1937), p. 20; Oppenheim, "The Science of International Law: Its Task and Methods," this JOURNAL, Vol. 2 (1908), p. 333 *et seq.*; Bergbohm, *Staatsvertrage und Gesetze als Quellen des Voelkerrechts* (Dorpat, 1876), p. 40 *et seq.*; and *Jurisprudenz und Voelkerrecht* (Leipzig, 1892), pp. 51, 52; Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (Berlin, 1928); Pound, "Mechanical Jurisprudence," *Columbia Law Rev.*, Vol. 8 (1908), p. 605; Morris Cohen, "The Concepts of Juridical and Scientific Law," *Politica*, Vol. 4 (1939), p. 8 *et seq.*; Ripert, "*Droit naturel et positivisme juridique*," *Annales de la Faculté de Droit d'Aix*, nouvelle série, No. 1 (Marseille, 1918), pp. 19, 20, 32 *et seq.*; Anzilotti, *Cours de Droit International*, Vol. 1 (Paris, 1929), p. 18 *et seq.*; Waline, "*Positivisme philosophique, juridique et sociologique*," *Mélanges Carré de Malberg* (Paris, 1936), p. 519; Gény, *Science et Technique en Droit privé positif* (Paris, 1915), Vol. 2, pp. 15 *et seq.*, 31, 37, 38. A good survey is to be found in Erism, *Le Positivisme juridique et le Droit International* (Paris, 1939).

which they then appeared to have been derived by a mere logical process. Through the back door of pseudo-logical interpretation the outlawed company of natural law and extra-legal value judgments reentered the legal system. This kind of pseudo-logical legerdemain became the predominating interpretative technique of legal positivism in the period of its decadence. In the last decades of the nineteenth century the standards of society went far away from the economic, social, political, and ethical assumptions from which the systems of statutory law had started.⁷ Hence, the positivists were compelled to resort to a series of pseudo-logical makeshifts in order to maintain the fiction of "legal self-sufficiency,"⁸ on which positivist jurisprudence had founded its theoretical system.

From three sides this fiction was, and still is, under attack. From the one side, sociological and realist jurisprudence, inspired partly and indirectly by the original sociological positivism of Comte, does away with the artificial barriers by which positivism has separated the legal sphere from the whole domain of the social sciences to which it actually belongs. Thus it destroys the positivist assumptions together with the positivist conclusions. From the other side, the neo-positivism of Kelsen's pure theory of law maintains the basic assumptions of positivism but undertakes to achieve the positivist ends by purifying the legal science from all material, non-legal elements, thus eliminating the subject-matter of positivist crypto-metaphysics.

Several schools of revived natural law, as well as the politico-ideological power of totalitarianism, have joined in this dual scientific attack. Totalitarianism has ostracized positivist jurisprudence as a manifestation of liberalistic decadence in Germany and Italy, where the domination of juridic thought by positivism has been at times almost undisputed, and where positivism has exerted its most far-reaching and fertile influence on the development of the legal science. Deprived of its traditional strongholds by political suppression and undermined by scientific criticism, positivism is no longer a guiding influence in modern legal thought.

POSITIVISM AND INTERNATIONAL LAW

In international law, unlike the other branches of legal science, positivism is still a determining influence. Ever since the turn of the century, internationalists have started with positivist assumptions, have followed the positivist method, and have professed adherence to the principles of positivism.⁹

⁷ An excellent analysis of this development is to be found in Bonnecase's history of the French "*École de l'Exégèse*," *La Pensée juridique française de 1804 à l'heure présente*, Vol. 1 (Bordeaux, 1933).

⁸ Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven, 1937), p. 57.

⁹ Cavaglieri could write in 1911 ("*La Conception positive de la société internationale*," *Revue gén. dr. pub.*, Vol. 18 (1911), p. 260): "Parmi ceux qui s'adonnent aux études de droit international, il n'est aujourd'hui personne qui ne fasse pas solennellement profession d'adhérer à la nouvelle conception positive du droit. . . ." Some years later Ripert could say (*Annales*, *loc. cit.*, p. 18): ". . . cette génération professe un positivisme juridique absolu."

Neither the opposition of natural law,¹⁰ nor Kelsen's neo-positivist criticism,¹¹ nor, finally, the rather implicit criticism of legal sociologists,¹² has been able to affect the predominance of positivist thought over the science of international law. The Permanent Court of International Justice still follows the time-honored pseudo-logical method of traditional positivism which prevailed in the jurisdiction of the domestic supreme courts at the turn of the century. The annals of this highest international tribunal record no instance where an advocate, like Brandeis in *Muller v. Oregon*,¹³ dared to break through the network of positivist formulae, nor of any majority opinion which would not have clung, on a very high level of technical perfection, to the traditional pattern of positivist argumentation. When Judge Hudson looks for a realistic decision with respect to international law he has to turn to the Court of Appeals of the State of New York.¹⁴ Compared to municipal law, international law is in a retarded stage of scientific development. As represented by its sanest elements, the science of international law still stands where the science of municipal law stood in 1910; in terms of its post-World War development, its most spectacular branches, invaded by the political ideology of Geneva, have gone back at least to the point from which positivism started in the last decades of the nineteenth century.

The collapse of the international law of Geneva, when for the first time its fictions were confronted with the full reality, meant of necessity the breakdown of the science which had been only its ideological reflection. The

¹⁰ Professor Lauterpacht (*Private Law Sources and Analogies of International Law* (London, 1927), p. 27, note 5; p. 58, note 7; Oppenheim-Lauterpacht, *International Law*, Vol. 1 (1937, p. 100) defends the opinion that positivism no longer dominates the science of international law, but has been replaced by a new doctrine of moderate natural law. It is difficult to share this opinion. Natural law and the post-war science of international law have only this in common, that they overstep the limits of experience. However, one would do injustice to the great metaphysical systems of natural law by identifying them with the post-war science of international law. Whereas Suarez and Grotius were fully aware of the aprioristic, metaphysical character of their propositions and had good philosophical reasons for adhering to them, post-war positivism helplessly confuses reality and imagination, wish and fact, because no longer does it possess the scientific means of distinguishing between both. Cf., also, Laski, *The State in Theory and Practice* (New York, 1935), p. 198; Wild, *loc. cit.*, p. 483 *et seq.*

¹¹ See, especially, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1928).

¹² See, especially, Max Huber, *Die soziologischen Grundlagen des Völkerrechts* (Berlin, 1928); Ray, *Hague Recueil*, Vol. 48 (1934), p. 631 *et seq.*; Schindler, *ibid.*, Vol. 46 (1933), p. 229 *et seq.*; Morgenthau, *La Notion du "politique" et la théorie des différends internationaux* (Paris, 1933), pp. 37 *et seq.*, 65 *et seq.*, and *La Réalité des normes, en particulier des normes du droit international* (Paris, 1934), pp. 139, 140, 215.

¹³ 208 U. S. 412 (1908). An excellent appraisal of the theoretical importance of this case is to be found in Frankfurter, "Hours of Labor and Realism in Constitutional Law," *Harvard Law Rev.*, Vol. 29 (1916), p. 353.

¹⁴ See the reference to Cardozo's opinion in *Techt v. Hughes*, 229 N. Y. 222, 241 (1920), in Hudson, "International Law in the Twentieth Century," *Cornell Law Quarterly*, Vol. 10, (1925), p. 435, note 75.

post-World War science of international law shared the short-lived and delusive splendor of its political master, and now shares with him the final detection of their common sham existence as well as the resulting disrepute. The helplessness of the science of international law in the face of those dangers, its very unawareness of them, its sincere self-deception as to its scientific character, are perhaps the gravest indictments which can be brought against the scientific value of the positivist doctrine of international law.¹⁵ The failure of the post-World War science of international law is not due to personal or accidental circumstances; it grows out of the very assumptions and methods which have led juridic positivism to defeat in the domestic field. Yet, in the international field the disastrous consequences of the genuine weakness of the positivist doctrine are doubled by the absence of the conditions which in the domestic domain made juridic positivism at least a temporary and apparent success.

Juridic positivism starts with the assumption that its subject-matter is to be found exclusively in the written law of the state. Only the rules of law, and all the rules of law which statutes and court decisions present as such, are the material with which the positivist doctrine has to deal. The criterion of the existence, that is, the validity of a legal rule, is, then, its incorporation into the written law of the state. We do not repeat here what we have said elsewhere of the scientific value of this juridic monism,¹⁶ and consider only the results of its being applied to the rules of international law. This criterion for the validity of legal rules means, if transferred to the international field, that the only valid rules of international law are those which are revealed by the decisions of courts and international treaties duly ratified and not formally revoked. Yet this concept is at once confronted with two problems for which the positivist doctrine of international law has no solution. On the one hand, all rules embodied in written documents are not valid international law, and, on the other hand, there are valid rules of international law other than the rules embodied in written documents. The positivist formula as applied to international law is at once too narrow and too broad.¹⁷

¹⁵ For criticism of post-war international law, see especially, Beckett, "International Law in England," *Law Quarterly Rev.*, Vol. 55 (1939), pp. 261, 262, 266; Borchard, this *JOURNAL*, Vol. 27 (1933), p. 518, Vol. 28 (1934), p. 108; Hill, *ibid.*, Vol. 23 (1929), p. 617; John Bassett Moore, *ibid.*, Vol. 27 (1933), p. 607; the same, *International Law and Some Current Illusions* (New York, 1924); the same, "An Appeal to Reason," *Foreign Affairs*, Vol. 11 (1933), see especially pp. 548, 585; the same, "Post-War International Law," *Columbia Law Rev.*, Vol. 27 (1927), see especially p. 412.

¹⁶ See Morgenthau, *La Réalité des Normes*, p. 106 *et seq.*; cf. also, the rather analytical than critical remarks by Edwin D. Dickinson, *Hague Recueil*, Vol. 40 (1932), pp. 337, 344; Siotto-Pintor, *ibid.*, Vol. 41 (1932), pp. 265, 266; Verdross, *ibid.*, Vol. 30 (1929), p. 276.

¹⁷ To the following discussion, see Morgenthau, "Positivism mal compris et théorie réaliste du Droit international," *Mélanges Altamira* (Madrid, 1936), p. 3 *et seq.*; see also, Affolter, "Der Rechtspositivismus in der Rechtswissenschaft," *Archiv fuer oeffentliches Recht*, Vol. 12 (1896/97), pp. 40, 41.

The science of international law has not developed a criterion to distinguish, in an objective way, between *seemingly* and *actually* valid rules of international law. "One can assert that nine-tenths of the traditional doctrines of international law are not actual international law," said Professor George Jellinek as far back as 1905.¹⁸ Declared Professor Oppenheim a few years later:

It is also indispensable that the science should free itself from the tyranny of phrases. As things are, there is scarcely a doctrine of the law of nations which is wholly free from the tyranny of phrases. . . . Any one who is in touch with the application of international law in diplomatic practice hears from statesmen every day the complaint that books put forth fanciful doctrines instead of the actual rules of law. Now it is often not difficult to push the irrelevant to one side and to extract what is legally essential from the waste of phrase-ridden discourse. But there are entire areas in which the tyranny of phrases so turns the head that rules which absolutely never were rules of law are represented as such.¹⁹

"On no subject of human interest, except theology," said John Chipman Gray at about the same time, "has there been so much loose writing and nebulous speculations as on international law."²⁰

If these statements were true in the first decade of the century, the development of the post-World War science of international law has only added to their significance. The Covenant of the League of Nations, for instance, is a duly ratified document which has never been repealed. But has it ever been valid international law as a whole? If not, which provisions never had the quality of valid legal rules, and which ones lost this quality in the course of the gradual collapse of the institution of Geneva? No treatise of the law of nations offers any general criterion to answer these questions, nor do the concrete answers given with reference to the actual validity of Article 16 of the Covenant reveal any such underlying objective criterion. The absolute denial of any validity, the assertion of a so-called "de facto revision," and the defense of full validity, are advanced side by side.²¹ Similar problems arise with respect to the Briand-Kellogg Pact and the Peace Treaties of 1919, as well as to other political treaties, such as the Pact of the Little Entente, alliance treaties, the concepts of aggression, independence, intervention, government, and so forth.²² They are em-

¹⁸ *System der subjektiven öffentlichen Rechte* (Tuebingen, 1905), p. 321; see also the even stronger criticism by Bergbohm, *Staatsverträge*, p. 8.

¹⁹ *The Future of International Law* (Oxford, 1921; first in German, 1911), pp. 58, 59; see also, *The Science of International Law*, pp. 315, 334.

²⁰ *Nature and Sources of the Law* (New York, 1927; first edition, 1909), p. 127.

²¹ Cf., for instance, Schwarzenberger, in *The New Commonwealth Quarterly*, Vol. 3 (1937/38), pp. 263, 360 *et seq.*; *ibid.*, Vol. 4 (1938/39), p. 60 *et seq.*; for an excellent statement of the problem, see Kunz, *id.*, p. 131, and this JOURNAL, Vol. 33 (1939), p. 33.

²² An excellent contribution to the understanding of this problem is to be found in Baty, "The Trend of International Law," this JOURNAL, Vol. 33 (1939), p. 653 *et seq.*, and "The Abuse of Terms," *ibid.*, Vol. 30 (1936), p. 377.

bodied in written documents which were duly ratified and never invalidated. Have they ever been valid law from the beginning, and what has become of them in the years of their violation? Are they still valid? If they are not, what destroyed their validity? These are questions which the interpreter of domestic statutes, subject to a rational process of validation and invalidation, is not likely to be asked, and hence the positivist doctrine of international law, following the pattern of domestic positivism, has nothing with which to answer them.²³

The basic assumption of juridic positivism, that its exclusive subject-matter is the written law of the state, leads legal science not only to the inclusion of alleged legal rules which no longer have or never have had legal validity, but also to the exclusion of undoubtedly valid rules of law. Positivist jurisprudence, starting with the axiom of "legal self-sufficiency," separates the law from the other normative spheres, that is, ethics and *mores*, on the one hand, and from the social sphere, comprehending the psychological, political, and economic fields, on the other hand. By doing so, positivism severs the actual relations between the law and the other branches of the normative and social sphere. It proceeds on the assumption that the law, as it really is, can be understood without the normative and social context in which it actually stands.²⁴ From the application of this assumption to international law there results a threefold delimitation of legal research, contrary to the exigencies of the reality, and hence a threefold misconception of what international law really is.

1. The normative sphere, comprehending the totality of rules governing a given society, is one whole with regard to the basic precepts it contains.²⁵

²³ This absence of any scientific test for the validity of the rules of international law is responsible for the perplexity into which some of the foremost representatives of the international law of Geneva have fallen in recent years. Professor Scelle, who had founded a whole system of "positive" international law upon "international solidarity," "international federalism," and like "social facts," in 1937 arrives at the conclusion that there is no such thing as international law at all. "Il n'y a plus en Europe de droit des gens," he writes in the *Journal des Nations* (No. 1665, Feb. 28 and March 1, 1937). "Il n'y a plus des traités." "The conclusion seems unescapable," says Professor Zimmern ("The Decline of International Standards," *International Affairs*, Vol. 17 (1938), p. 12), "that positive international law, so called, has no claim to the name of law." (See also the same, *The League of Nations and the Rule of Law 1918-1935* (London, 1936), p. 94.) These scholars, who never cared for such "abstract" problems as the criterion of the validity of a rule of law, now fall from one error into the other. First, they accepted the assumed validity of post-war international law without question; now, since it is obvious that the main bulk of this so-called international law never has been valid law at all, they identify this product of their imagination with the main bulk of pre-war international law, which today is as valid as it has ever been, and declare that international law simply does not exist!

²⁴ "Can we even understand English law without going beyond the actual rules themselves?" asks Paton in his interesting paper, "Whither Jurisprudence," *Politica*, Vol. 4 (1939), p. 16.

²⁵ To the following discussion, see Pound, "The Part of Philosophy in International Law," *Proceedings of the 6th International Congress of Philosophy* (New York, 1927), p. 374 et

Although there may be in a given society particular legal rules which contradict particular ethical rules or *mores*, and *vice versa*, the main bulk of basic ideals to be realized, of ends to be achieved, and of interests to be protected, is generally the same in the different branches of a given normative order. Law, ethics, and *mores* support each other in the pursuit of these aims. Legal rules refer to ethics and *mores* for the determination of their meaning and *vice versa*.²⁸ The guiding influence, however, as to the ideals, ends, and interests to be pursued by the norms under which a given society lives, emanates from the ethical sphere. From it law and *mores* receive the fundamental distinctions between the good and the bad, the ends to be advanced and the ends to be opposed, the interests to be protected and the interests to be repudiated. At the base of any legal system there lies a body of principles which incorporate the guiding ideas of justice and order to be expounded by the rules of law. The intelligibility of any legal system depends upon the recognition of such a set of fundamental principles which constitute the ethical substance of the legal system, and shed their illuminating light upon each particular rule of law.

This recognition is relatively easy to perform in the domestic field, where the constitution codifies the main bulk of those fundamental principles, and a highly integrated public opinion provides supplementary moral guidance. The task is much more difficult with respect to international law. Here there is no body of such principles separate from the ordinary rules of law. Some of those principles may be only partly expressed in these rules; others may not be expressed at all, and hence have to be detected, in a dangerously uncertain procedure, in the general moral ideas underlying the international law of a certain time, a certain civilization, or even a certain nation. Yet the successful search for these principles is as essential for the scientific understanding of international law as of any legal system.

Legal positivism is unable to grant this recognition; for at its basis there is the hostility to all matters metaphysical, that is, those which cannot be ascertained by actual observation. Since non-legal rules have generally entered the horizon of the positivist jurist as metaphysical rules of natural law, the positivist is inclined to identify natural law and ethics as such, and to repudiate both as metaphysics. However, to exclude *a priori* a certain subject-matter from scientific research by calling it metaphysical, instead of impartially examining actual experience, is to blind oneself to a preconceived idea originating, not in experience, but in mere reasoning, and thus to do violence to the facts. Hence, the positivist concept of the normative sphere

seq.; Bentwich, *The Religious Foundations of Internationalism* (London, 1933), especially p. 262 *et seq.*; Zimmern, "International Law and Social Consciousness," *Transactions of the Grotius Society*, Vol. 20 (1934), p. 25 *et seq.*; *cf.*, particularly, the brilliant paper by Schwarzenberger, "The Rule of Law and the Disintegration of the International Society," *this JOURNAL*, Vol. 33 (1939), p. 56.

²⁸ We have dealt with this problem in *La Réalité des Normes*, p. 155.

itself reveals a metaphysical attitude, a kind of negative metaphysics which plainly contradicts the very assumptions of a positive science.²⁷

Yet positivism has never been quite able to live up to its legalistic and anti-metaphysical assumptions. The very nature of its subject-matter has compelled it time and again to violate its own assumptions and make use of fundamental principles not revealed by "positive" law. In order to give at least apparent satisfaction to these assumptions, positivism dares to make use of such principles only under the disguise of positivist concepts, and therefore develops a fictitious method which tries by pseudo-logical arguments to derive from "positive," that is, written, rules of international law something that those rules do not contain. The interminable and quite sterile discussions on the foundation of the binding force of international law are evidence of this word-juggling, since this is a problem which, as defined in the positivist terms of mutual consent and the like, is contradictory in itself, and hence insoluble within the framework of positivism. The foundation of the binding force of "positive" law can logically be found, not in this "positive" law itself, but only outside it.²⁸ Another example is the problem of sovereignty as defined and solved by positivism. Here again a fundamental principle which, by its very nature, cannot be derived from "positive" law, but from which "positive" law itself rather derives its meaning, is to be dealt with as if it were a rule of "positive" international law. It is for these helpless attempts to conciliate its legalistic assumptions with actual juridic experience that the positivist doctrine of international law is bound to misrepresent the reality of international law and to fail to do justice to its actual content.²⁹

2. The precepts of international law need not only to be interpreted in the light of the ideals and ethico-legal principles which are at their basis. They need also to be seen within the sociological context of economic interests, social tensions, and aspirations for power, which are the motivating forces in the international field, and which give rise to the factual situations forming the raw material for regulation by international law.³⁰ The correctness of

²⁷ For this point, see Liard, *La Science positive et la métaphysique* (4th ed., Paris, 1898), pp. 38, 57, 72. See also Ruggiero, *loc. cit.*, p. 261: "Not only the extreme difficulty of maintaining itself on a level strictly positive and not exceeding the limits of experience but also the tendency . . . to identify objectivity with materiality, have often caused positivism to range over into materialism, that is, into metaphysics, in contradiction to its own premises." As to the specific legal phenomenon of "positivism ending in disregard of positive law," see Lauterpacht, in *Modern Theories of Law* (London, 1933), pp. 132, 133; and Morgenthau, *Positivism mal Compris*, pp. 3, 4.

²⁸ Strupp, *Hague Recueil*, Vol. 47 (1934), p. 298; Brierly, *The Law of Nations* (London, 1936), p. 45.

²⁹ Brierly, *The Shortcomings of International Law*, p. 4 *et seq.*; Morgenthau, "The Problem of Neutrality," *University of Kansas City Law Rev.*, Vol. VII (1939), p. 110; Wild, *loc. cit.*, p. 478 *et seq.*

³⁰ For this point, see Brierly, *op. cit.*, pp. 5, 16; Kenneth Colegrove, *Proceedings of the 5th Conference of Teachers of International Law*, p. 97; Ray, *Annales Sociologiques*, série C,

this postulate for the interpretation of municipal law is today self-evident. Nobody would ever try to interpret social legislation without reference to the conflicting social interests to be evaluated and the social relations to be settled. Nobody would ever endeavor to grasp the legal meaning of economic legislation without making economic interests and conflicts part of the reasoning. Even where the reference to the underlying economic and social forces and relations is not always explicit, as in the field of contracts, the sociological context is nevertheless always referred to by implication. It is only because of the highly typical character of the factual situations and their social and economic significance, with which everybody is familiar, and which are completely and adequately expressed in the legal rules, that the mere reference to those legal rules implies the consideration of the social and economic factors which are at their basis.

It was, historically, the most disastrous error of positivism to misunderstand completely this implicit reference to the sociological context which every legal rule contains. This error can be traced back to the tradition of the pandectists, who had in the Roman law the classical model of a highly typified legal system which expressed with perfect appropriateness the fundamental interests and relationships which can arise from the social activities of men. So perfectly was this sociological context represented in the abstractions of the Roman law, that the pandectists were only too prone to forget its very existence and to deal with those abstractions as with independent logical entities. So did the positivists, both in the municipal and international fields.³¹ This methodological error was of minor importance where the legal concepts were true abstractions from the interests and relations which they were supposed to regulate. When, however, those legal rules were applied to interests and relations to which some of them referred only partly, others not at all, that methodological error was bound to have a disastrous influence upon the scientific value of positivist jurisprudence. In the domestic field, it became instrumental in distorting the legal reality and originating that positivist conceptualism with which a decadent legal science attempted to adapt the old legal rules to new economic and social needs, but at the same time maintained the fictitious assumption that the written law already contained, logically, all the rules necessary for the solution of those new problems. Thus the juridical pseudo-logic became the artificial makeshift by which a stationary law could be reconciled with a moving social reality.

In the international field, the methodological error of neglecting the socio-

No. 3, p. 14 *et seq.*; cf. especially, the excellent remarks by Friedman, *Modern Law Review*, Vol. 2 (1938), p. 194; and review, *ibid.*, p. 81.

³¹ For the influence of Roman law upon international law, see Pound, *loc. cit.*, pp. 376, 377; Lauterpacht, *Private Law Sources*, p. 23 *et seq.*; Alvarez, *Nouvelle Conception des Études juridiques*, p. 47 *et seq.*

logical context of international law led to even worse consequences.³² In the domestic field, the correspondence between legal concepts and sociological context was at least a temporary fact, and within this limit the negligence of the sociological context and the assumption of the "self-sufficiency" of the written law could be justified. In the most important branches of international law this correspondence has never, and could never, have existed. The sociological relationships underlying those branches of international law are characterized by their individual, non-typical nature.³³ A political situation in the international field is not likely to repeat itself, since the variety of factors of which it is composed makes for an indefinite number of possible combinations. Hence only a strictly individualized rule of law will be adequate to it. International law provides partly for such individualized rules by restricting the application of a rule to one individual case and leaving the regulation of similar future cases to new legislative efforts. Peace treaties are instances of such individualized rules of international law. In part, however, international law does maintain the form of the general, typical rule of law and depends on the interpretation of the rule to provide the flexible meaning which the ever-changing sociological context requires. All political treaties which are intent upon establishing permanent rights and duties between the contracting parties are of this kind. The same generally and typically worded text may imply quite different rules, according to the political function which it is supposed to fulfill.³⁴ Thus one is able, for instance, to distinguish three different periods in the history of the Treaties of Locarno.³⁵ Those three periods are characterized by three significant changes in the normative content of the rules, resulting from changes in the political context, although the wording of the rules remained unchanged. The Covenant of the League of Nations, as a whole, as well as particular provisions, for instance, Article 16, have been submitted to similar modifications as a result of factual sociological developments and not of legislative changes.³⁶

The same phenomenon occurs not only in temporary succession, but also

³² Reeves, *Proceedings of the 2nd Conference of Teachers of International Law*, pp. 72, 73.

³³ This high degree of individualization is clearly recognized by Brierly, *Hague Recueil*, Vol. 58, p. 16; Ray, *ibid.*, Vol. 48, p. 699; Schindler, *ibid.*, Vol. 46, p. 265.

³⁴ The same phenomenon with regard to municipal social legislation has been excellently described by Frankfurter, *loc. cit.*, pp. 369, 370: "It is now clearly enough recognized that each case presents a distinct issue; that each case must be determined by the facts relevant to it; that we are dealing, in truth, not with a question of law but the application of an undisputed formula to a constantly changing and growing variety of economic and social facts. Each case, therefore, calls for a new and distinct consideration, not only of the general facts of industry but the specific facts in regard to the employment in question and the specific exigencies which called for the specific statute."

³⁵ See Morgenthau, "*Théorie des Sanctions internationales*," *Revue de Droit Int. et de Lég. Comp.*, Vol. 16 (1935), p. 832.

³⁶ See Morgenthau, "The Resurrection of Neutrality in Europe," *Am. Pol. Sci. Rev.*, Vol. 33 (1939), p. 473.

under contemporaneous yet different sociological conditions. The identical text of an arbitration treaty or non-aggression pact may have quite different legal meanings, according to the political situation existing between different contracting parties.³⁷ Even one and the same legal rule, as, for instance, Article 16 of the Covenant, lends itself to different interpretations with respect to states living under different political conditions.³⁸

The positivist doctrine of international law has completely ignored this particular relationship between the rules of international law and their sociological context. Positivism transplanted schematically the highly refined positivist method of formalist and conceptualist interpretation into the domain of international law. This method developed under, and was justified by, the specific domestic conditions of a temporarily stabilized society where there was approximately no tension between law and sociological context but almost complete rationalization and representation of the sociological context within the concepts of positive law. Schematically applied to a law and a society of a distinctly different nature, this method was bound to produce entirely inadequate results. Where the experience of international law showed that an individual situation required an individual interpretation of the legal rule, the positivist method could not fail to disregard all individual aspects of the factual situation and concentrate upon the general wording of the legal rule which, by virtue of its logical self-sufficiency, was supposed to contain all elements necessary for its understanding; and to this the reference to the sociological context could contribute nothing. An arbitration treaty which submitted all conflicts between the contracting parties to international tribunals was a legal document that revealed its legal significance through its text, *i.e.*, another step towards the establishment of an international order based upon respect for law. Whether the treaty was concluded between Switzerland and Uruguay, or Denmark, Sweden, and Norway, or Great Britain and France, or Germany and Poland in 1925, 1935, or 1939—these were "political" considerations irrelevantly lying beyond the scope of positivist interpretation.³⁹

3. The positivist doctrine, by recognizing as international law only the rules enforced by states, excludes from the domain of international law all rules whose validity cannot be traced to the written documents of states. On the other hand, the positivist doctrine cannot deny that such rules, like most rules of general international law, actually exist. Confronted with the embarrassing dilemma of violating its own *étatist* assumptions or of dis-

³⁷ Leresche, "*La Crise du Droit des Gens*," *Rev. int. Française du Droit des Gens*, Vol. 6 (1938), p. 303.

³⁸ See the excellent criticism by Barandon, *Das System der politischen Staatsverträge seit 1918* (Handbuch des Völkerrechts, Vol. 4), p. 1.

³⁹ See author's analysis of arbitration treaties concluded under different political circumstances, in *International Jurisdiction, its Nature and its Limits* (in German, 1929), p. 181 *et seq.*

regarding an obvious part of legal experience, the positivist doctrine has taken refuge in a concept which has become a veritable panacea for its theoretical troubles. We are referring to the concept of customary law, which has served for the traditional doctrine of international law as a kind of collective designation for all the rules of international law the origin of which cannot directly be traced to written sources. The insurmountable theoretical difficulties of explaining the existence of a so-called customary law have been pointed out elsewhere,⁴⁰ and this is no place to resume the discussion. It is sufficient to state that the reconciliation which the positivist doctrine is able to establish between its monist, legalistic assumptions and the existence of a so-called customary law, is merely apparent. In order to save these assumptions as well as those facts, it resorts to a series of fictions, like tacit consent, recognition, judicial admission, and so forth, which indirectly endeavor to attribute the existence of the so-called customary rules of international law to the legislative will of states.

PREFACE TO A FUNCTIONAL THEORY OF INTERNATIONAL LAW

The fundamental weakness of the positivist doctrine of international law lies in its inadequacy to international law as it really is. Unfaithful to its own assumptions, it contains at the same time more and less than the actual rules of international law, which it furthermore submits to subjective evaluation in the light of ethical and political principles of assumedly universal, yet doubtful, validity. A truly scientific theory of international law must avoid these mistakes in order to come closer to the reality. It seems to be a logical choice to call such a theory by the name of realist. There are, however, two objections to this choice. On the one hand, the increasing disrepute of the traditional doctrine of international law has led no few practitioners of this doctrine to demonstrate their closeness to the reality of international law by calling themselves "realists."⁴¹ This misuse has deprived the term of its distinctive character in the international field. On the other hand, realism has become a collective designation for several tendencies in modern jurisprudence, all aiming at replacing, by different means, the fictitious legalism of traditional jurisprudence with a conception nearer to the realities of the law. All these tendencies have this in common: They do not regard the legal rules as definitely determined by their legislative or judicial formulation, but search for the psychological, social, political and economic forces which determine the actual content and working of legal rules and

⁴⁰ *La Réalité des Normes*, p. 89 *et seq.*; for criticism of the doctrine of customary international law, see also, Briery, *Hague Recueil*, Vol. 58, p. 29; Ray, *ibid.*, Vol. 48, pp. 697, 698.

⁴¹ See, for instance, Kaufmann, *Hague Recueil*, Vol. 54 (1935), pp. 319, 320; Scelle, *ibid.*, Vol. 46 (1933), p. 691; Verdross, *ibid.*, Vol. 30 (1929), p. 277; Le Fur, in *Revue de Droit International*, Vol. 17 (1936), p. 7—authors who have certainly not very much in common besides the claim of being "realists." Cf. also, Lundstedt who, according to Pound, *loc. cit.*, p. 145, qualifies Pound, Kelsen, and Duguit as "realists"!

which, in turn, are determined by them. In other words, their scientific goal is to formulate uniform functional relationships between those forces and the legal rules. Hence, "realist" jurisprudence is, in truth, "functional" jurisprudence.⁴²

The legacy which positivism has left to the science of international law consists in the task of comprehending the international law of a given time as standing in a dual functional relationship with the social forces of this time. On the one hand, international law is the function of the civilization in which it originates, that is, of the regulative ideas laid down in the ethics and mores of this civilization, of the political, economic and general social forces prevailing in it, and, finally, of the specific psychological factors manifesting themselves in the individuals determining it. On the other hand, international law is a social mechanism working towards certain ends within this same civilization which, in turn, as far as determined by it, becomes a function of this same international law. By systematizing the rules of a given international law under the viewpoint of this dual functional relationship between rules and social forces, the functional theory will arrive at a real scientific understanding of the material element of the legal rules which positivism even at its best was able to describe and systematize only according to superficial legalistic viewpoints.⁴³

Six important consequences for a functional theory of international law

⁴² Although the doctrine developed in the text is undoubtedly of a sociological nature, we would rather prefer to avoid the term; for sociological jurisprudence, through the influence of Professor Pound's writings, is associated with the idea of "social engineering," which is, from the standpoint of the contemporaneous legal science, a very premature proposition; see, *infra* VI under.

⁴³ The principles of functional jurisprudence, as understood in this paper, have been admirably formulated by Llewellyn, "Legal Tradition and Social Science Method—a Realist's Critic," *Essays on Research in the Social Sciences* (Brookings Institution, 1931); and "Some Realism about Realism," *Harvard Law Rev.*, Vol. 44 (1930/31), p. 1236 *et seq.* The transition from positivism to functionalism is excellently described by Pound, "Fifty Years of Jurisprudence," *ibid.*, Vol. 51 (1937/38), pp. 446, 447: "The determining impetus came from positivism and the direction was sociology, leading to functional study of legal institutions in the light of all the social sciences, and tends to consideration of the legal order as a social institution rather than exclusive consideration of the legal materials with which tribunals work in upholding that order." See also, Hudson, *Cornell Law Rev.*, Vol. 10, p. 434. The functional viewpoint is excellently developed also by P. Alex, *Du Droit et du Positivisme* (Paris, 1876), see especially pp. 12 *et seq.*, 26 *et seq.*, 39, 118. This work, completely forgotten today, endeavors to apply the principles of a well-understood positivism to jurisprudence, and thus puts by implication the subsequent aberrations of juridic positivism in the right light. See also, the penetrating article by Felix S. Cohen, "The Problems of Functional Jurisprudence," *Modern Law Review*, Vol. 1 (1937/38), p. 5; and Malinowski, "The Group and the Individual in Functional Analysis," *Am. Jour. of Sociology*, Vol. 44 (1938/39), p. 951: "I would like to add that the science of modern jurisprudence could become inspired by anthropology in treating legal phenomena within the context of social life and in conjunction with other norms of conduct." For the philosophical background, see Kallen, "Functionalism," *Encyclopedia of the Social Sciences*, Vol. 6, p. 523.

can be drawn from this recognition of the functional relationship between social forces and international law.⁴⁴

I. A functional theory of international law has to start with the recognition of the particularly intimate nature of this relationship.⁴⁵ In the domestic field, legal rules can be imposed by the group which holds the monopoly of organized physical force, that is, the officials of the state. The international sphere is characterized by the absence of such a group. International law owes its existence to identical or complementary interests of states, backed by power as a last resort, or, where such identical interests do not exist, to a mere balance of power which prevents a state from breaking these rules of international law. Where there is neither community of interests nor balance of power, there is no international law. Whereas domestic law may originate in the arbitrary will of the rule-making agencies of the state, international law is usually the result of objective social forces. When, in the international field, an arbitrary rule-making power tries to impose rules supported neither by common interests nor by a balance of power, these rules never become valid law, or gain only ephemeral existence and scant efficacy; the history of the rules embodied in the Treaty of Versailles and the Covenant of the League of Nations is a striking example of this.

It is also due to this intimate relationship between social forces and legal rules that in the international field fundamental changes of the social forces and, hence, of the legal rules, follow each other at frequent intervals and in an abrupt, often violent, manner. In the domestic field the regulative social force dominating all others is the state. It has developed not only an overwhelming power apparatus, but also highly refined mechanisms of legislative and judicial readjustment, which lead the social forces into certain channels without disrupting the legal and social continuity. Here, the state selects in authoritative decisions the social forces to be recognized by the law. It decides to what extent the existing legal rules shall yield to changing conditions, to what extent they shall resist them, and in what ways they shall try to transform them. In the international field the authoritative decision is replaced by the free interplay of political and military forces. This makes a gradual readjustment of the law to changing social conditions extremely difficult. Any fundamental change of the social forces underlying a system of international law of necessity induces the prospective beneficiaries of the change to try to bring about a corresponding change of the legal rules, whereas the beneficiaries of the legal *status quo* will resist any change of the old order. Here a competitive contest for power will determine the

⁴⁴ These consequences can be stated within the limits of this paper only in very general terms, and other consequences may be revealed through application of the principles developed in the text to special problems; see the enumeration of possible further consequences, in *Positivism mal compris*, p. 20.

⁴⁵ This relationship is clearly recognized by Huber, *op. cit.*, p. 9 *et seq.*; Schindler, *loc. cit.*, p. 237 *et seq.*; see also, *La Réalité des Normes*, pp. 139, 140, 215.

victorious social forces, and the change of the existing legal order will be decided, not through a legal procedure provided for by this same legal order, but through a conflagration of conflicting social forces which challenge the legal order as a whole.⁴⁶

Where such a conflict between social forces and the rules of law exists, the character and function of the whole legal order undergo a transformation. We have proposed to call this relationship by the name of "tension," and have dealt with its legal consequences elsewhere.⁴⁷

II. This recognition of the peculiar relationship between social forces and rules of international law provides the clue for restating, in functional terms, the doctrine of the validity of international law.⁴⁸ A rule of international law does not, as positivism was prone to believe, receive its validity from its enactment into a legal instrument, as, for instance, an international treaty. There are rules of international law which are valid, although not enacted in such legal instruments, and there are rules of international law which are not valid, although enacted in such instruments. Enactment, therefore, is no objective criterion for the alleged validity of a rule of international law. A rule, be it legal, moral, or conventional, is valid when its violation is likely to be followed by an unfavorable reaction, that is, a sanction against its violator. An alleged rule, the violation of which is not followed by such a sanction, is a mere idea, a wish, a suggestion, but not a valid rule. An alleged rule of international law, against the violation of which no state reacts, and is likely to react, is proved, by this very absence of probable reaction, not to be a valid rule of international law. The gradual invalidation of the territorial provisions of the Treaty of Versailles, and of most articles of the Covenant of the League of Nations, by violation and non-intervention of sanctions against these violations, are experimental proof of the correctness of this concept of validity.⁴⁹

How, then, are we to know beforehand when such sanctions are likely to intervene in behalf of a violated norm, and when not, and, hence, how are we

⁴⁶ This problem, which refers to the validity of international law and its dynamic aspects, should be clearly distinguished from the problem discussed *supra*, under par. 2. There we had to do with the question as to how in the international field the particular characteristics of the social context are represented in the material concepts of the legal rules.

⁴⁷ On the theory of international "tensions," see Morgenthau, *International Jurisdiction*, p. 59 *et seq.*; and *La Notion du "Politique,"* p. 37 *et seq.* This theory has been thoroughly discussed by Ray, *Annales sociologiques, série C*, No. 1 (1935), p. 163 *et seq.*

⁴⁸ As to the problem of the validity of international law, see Morgenthau, *La Réalité des Normes*, pp. 28 *et seq.*, 212 *et seq.* Professor Timasheff, *An Introduction to the Sociology of Law* (Cambridge, 1939), p. 271, calls the theory developed there an "artificial construction." However, it seems to us that the artificiality of this theory is only the reflex of the artificial character of international law itself; as to this theory of validity in general, see his remarks, *ibid.*, pp. 142, 166, 299, 300. The psychological mechanism underlying the validity of international law is well described by Baty in this JOURNAL, Vol. 33 (1939), p. 653.

⁴⁹ For the relationship between sanctions and validity, see also, "*Théorie des Sanctions Internationales*," *loc. cit.*, pp. 474 *et seq.*, 809 *et seq.*

to say, in an objective, scientific way, which norms are valid and which are not? The consideration of the functional factor will give the answer.

1. The commonest and simplest test for the validity of an alleged rule of international law is this: State A has, in the past, requested State B to perform certain actions corresponding to the rule, whereas State B, in turn, has requested State A to perform certain actions corresponding to the same or another rule. Where these identical or complementary interests in the mutual observance of these rules did not suffice to guarantee the actual observance, both states were willing to enforce compliance with the rule by protest, reprisal, or military action. Where there was, in the past, a recognized identical or complementary interest in a certain action on the part of two or more states, together with the willingness to enforce this action, there exists the likelihood that the same sanctions for the sake of the same interests will also be performed in the future. Respect for the status of diplomatic representatives has been, in the past, an interest recognized and guaranteed with sanctions by all states; therefore, the forecast is justified that the states will follow the same course of action in the future.

The enactment of rules corresponding to such interests in international treaties may indicate the permanent nature of those interests, but this is an assumption which needs support from the facts and which can be disproved by them. Another indication of the permanence of such interests is their sublimation into moral principles, which pretend universal validity and endeavor to give certain interests of exceptional importance a justification superior to that which they could derive from the law.

2. The situation, however, is not always so simple. Three possible situations present themselves for examination. It can be that:

(a) Identical or complementary interests survive the willingness to enforce the actions corresponding to them. The provisions of the Treaties of Locarno were the function of identical and complementary interests of the contracting parties. When Germany violated these treaties by remilitarizing the Rhineland, the interests of the signatories in the demilitarization survived their willingness to enforce an attitude corresponding to their interests, and thus the respective rules of international law lost their validity.

(b) The willingness to enforce certain actions corresponding to identical or complementary interests survives the interests themselves. The provisions of the Treaty of Versailles establishing the German-Polish frontier from the outset did not correspond to the interest of both states. These provisions were observed for a period of twenty years because there existed a balance of power between both nations and their respective allies, which prevented either of them from violating the law.

(c) The interests and the willingness to enforce the actions corresponding to them disappear altogether. In this category belong the French-Russian and German-Italian military alliances, the Pact of the Little Entente, the

political provisions of the Covenant of the League of Nations, and numerous provisions of the Peace Treaties of 1919.

What does the analysis of these cases show with regard to the validity of international law? In the cases (a) and (c) the rules of international law become invalid according to the functional concept of validity because no longer does there exist a likelihood of sanctions being performed, should those rules be violated. In case (b) the validity of the rules depends upon a balance of power, which may be stable for a certain time, and then suddenly become unstable, but which in our time is of a rather permanently unstable and precarious nature. All cases have this in common, that they make forecasts as to the likelihood of sanctions extremely uncertain. The enactment of the rules in international treaties is here of no avail, and, as contemporaneous examples have amply shown, is rather misleading. Their conformity with moral principles is scarcely more illuminating because of the aforesaid difficulty of ascertaining the exact moral nature of such principles.

Where the functional relationships between sociological forces and international law is in a state of transition from (1) to one of the situations under (2) the development may as well stop at an intermediate point between (1), on the one hand, and (2 a) and (c), on the other; proceed to (2 b); or, finally, come to an end at (2 a) or (c). Here, the validity of the respective rules of international law is, so to speak, in suspense, and may be as well maintained or destroyed. With respect to such rules the science of international law becomes a system of guesses, enjoying a greater or lesser chance of being proved true according to the factual development of the functional relationship between the social forces and the rules of international law.⁵⁰

III. It follows from this analysis that there exist two obviously different types of international law, one founded upon the permanent and stable interests, the other based upon the temporary and fluctuating interests of states.⁵¹ This differentiation is not only of fundamental importance for the understanding of the validity of international law; it leads to yet more far-reaching consequences as to the subject-matter, the methods, and the scientific character of the science of international law. One might even say that it leads to the recognition of two different sciences of international law which deal with different subject-matters, and apply, or rather ought to apply, different methods of research and systematization.

The main bulk of the concepts and principles of international law has been derived from municipal civil law. These concepts and principles have been

⁵⁰ Wharton, *International Law Digest*, Vol. 2 (Washington, 1881), p. 34, makes, in connection with *Jones v. Walker*, 2 Paine 688, a very interesting distinction between necessary, that is, juridic, and voluntary, that is, political validity.

⁵¹ The classical concept of *jus necessarium* (see Morgenthau, *Positivisme mal compris*, pp. 16, 17) and Huber's distinction between territorial and extraterritorial rules (*loc. cit.*, p. 45 *et seq.*) refer to related but not identical differentiations. See also, Starke, "Monism and Dualism in the Theory of International Law," *British Year Book of International Law*, Vol. 17 (1936), p. 78 *et seq.*

developed within a legal system characterized by the extraordinary stability of the interests underlying it. Hence its application is, of necessity, restricted to legal systems based upon equally stable interests. In the international field such stable interests exist, for instance, with respect to diplomatic privileges, territorial jurisdiction, extradition, wide fields of maritime law, arbitral procedure, and so forth. This is the classical field of traditional international law as it has gradually developed in the practice of states since the sixteenth century. We propose to call these rules non-political international law, originating in the permanent interests of states to put their normal relations upon a stable basis by providing for predictable and enforceable conduct with respect to these relations.

But there is another type of international law which expresses, in terms of rights and duties, temporary interests ever given to change. In this category belong political agreements, especially treaties of alliance and their modern substitutes, which, under the legalistic disguise of treaties of general arbitration, consultation, or friendship, frequently pursue aims at least preparatory to close political ties. The traditional science of international law treats both types of international law alike, applying to both the concepts and methods developed in municipal civil law.⁵² By doing so, it cannot but draw a completely distorted picture of those rules which belong in the category of political international law. Under such treatment, their validity appears to be firmly established, whereas it is actually always precarious; the interests which they are supposed to serve appear to be permanent and definite, whereas they are actually exposed to continuous change and are more or less uncertain; and consequently, the rights and duties established by them appear to be clearly determined, whereas they are subject actually to the most contradictory interpretations.

This writer knows of only one monograph dealing with political international law as an independent subject-matter requiring concepts and methods of its own: Rafael Erich's *Alliances and Alliance Treaties*.⁵³ He is aware of only a few references clearly stating the functional relationship between the political rules of international law and the underlying social factors: Judge Manley O. Hudson remarks that "if international law is to be built on solid foundations, it is no more possible to ignore the political and social phases of the prevailing international order than it is possible to ignore similar phases of the prevailing national order in the building of municipal law";⁵⁴

⁵² This problem is clearly seen by Whitehead, "An Appeal to Reason," *Atlantic Monthly* (March, 1939), p. 311: "Obligation, in European foreign policy, arises from the immediate situation and from duty to the future. Formal law can refer only to situations sufficiently stable." See also, Hudson, *loc. cit.*, p. 435: "Where the nineteenth century sought the vindication of natural rights, it must be our task to ascertain and evaluate interests."

⁵³ In German, Helsingfors, 1907.

⁵⁴ The Permanent Court of International Justice (New York, 1934), p. 567; see also p. 552 *et seq.*, and Proceedings of the 2nd Conference of Teachers of International Law, p. 40, with Fenwick, *ibid.*, p. 69, and this JOURNAL, Vol. 33 (1939), p. 107, agreeing. In the same

a similar remark in the Harvard Research in International Law reveals the same author;⁵⁵ and, finally, Professors Jessup⁵⁶ and Wild⁵⁷ urge the functional approach. There seems to be only one judicial opinion clearly pointing to the practical consequences of this relationship: Judge Anzilotti's dissenting opinion in the Austro-German Customs Union Case.⁵⁸ It remains for a functional theory of international law to develop systematically concepts and methods capable of conveying the legal characteristics, as well as the functional dependence on political factors, of political international law.

IV. As we have seen, there exist functional relationships not only between the law and the non-normative social forces, but also between the law and the other branches of the normative sphere, that is, ethics and *mores*. The latter are threefold with regard to the validity and the content of the rules of law.

As has been shown elsewhere,⁵⁹ the validity of any legal system reposes upon a fundamental norm which itself cannot be of a legal nature, but belongs of necessity to the domain of ethics and *mores*. Thus, the validity of the legal system of the United States reposes, on the one hand, upon an ethical rule enjoining upon the President, the members of Congress and of the Supreme Court to obey the Constitution, and, on the other hand, upon the *mores* keeping alive among the citizens the respect for the Constitution. When one or the other of these ethical foundations is lacking, the validity of the Constitution and of the legal system founded upon it is in a precarious state. When all are lacking, the Constitution, and with it the whole legal system, have ceased to exist as a living legal order even though they may not have been formally invalidated.

Not only does the validity of the legal system as a whole repose upon ethics and *mores*, but the validity of individual legal rules also stands frequently in a particular functional relationship with ethics and *mores*. It can be that the validity of one and the same precept, for instance, "Thou shall not kill,"

direction points the remark by McNair, *Hague Recueil*, Vol. 43 (1933), pp. 251 and 252: "Nous appartenons à l'école de ces juristes qui pensent que la science du droit international a besoin aujourd'hui des matériaux à mettre en oeuvre plus que des thèses et des monographies."

⁵⁵ Research in International Law under the Auspices of the Faculty of the Harvard Law School, this JOURNAL, Supp., Vol. 29 (1935), p. 953; see also pp. 937, 938, 947.

⁵⁶ Proceedings of the 3rd Conference of Teachers of International Law, p. 134 *et seq.*

⁵⁷ Am. Pol. Sci. Rev., *loc. cit.*

⁵⁸ As to the defectiveness of the majority decision from the functional standpoint, see Hudson, "The World Court and the Austro-German Customs Régime," American Bar Association Journal, Vol. 17 (1931), p. 793: "In our national courts, a refusal to take account of the social and political conditions to which law must be applied, has produced some of the sharpest criticism of our legal systems. . . . An international court might similarly build a law in disregard of the political factors which condition its application, but it would almost certainly lack both the appearance and the substance of reality."

⁵⁹ *La Réalité des Normes*, pp. 76 *et seq.*, 174 *et seq.*, 216 *et seq.*

reposes upon the likelihood that against its violation there will be performed sanctions pertaining to the domains of ethics and *mores*, as well as to the realm of the law. Many provisions of the Constitution, of civil and criminal law, belong to this category, and, therefore, are at the same time legal rules, ethical rules, and rules of the *mores*. It is obvious that this double or triple guaranty has an important bearing upon the observance and validity of a given precept. When such a multiple guaranty exists, that is, when ethics, *mores* and law coöperate to realize a certain order of things, there is a much greater likelihood that this order will be realized than when the law alone strives for this goal.⁶⁰

It has already been pointed out that legal rules receive their precepts partly from ethics and *mores*. The meaning of these precepts requires explanation in the light of these other rules from which it is derived. The Constitution itself, for instance, does not reveal what "due process of law" or "freedom of contract" is; it is only by reference to the ethics and *mores* of a certain period of constitutional history that the meaning of these constitutional concepts can be determined.

The recognition, with regard to international law, of these three fundamental relationships, here hinted at rather than actually explained, calls for the discussion of a series of problems which the traditional science of international law does not even care to pose. What is, for instance, the empirical nature of the dual relationship between international law, on the one hand, and ethics and *mores* on the other? Are there ethics and *mores* of a truly international nature, or do we call by the name of "international," ethics and *mores* the precepts of which have been developed under the determining influence of the individual states and are applied to international affairs in the interest of these states? Which rules of international law belong, at the same time, to ethics and *mores*, and so have a greater chance of being observed? The meaning of which rules of international law can be only determined by reference to ethics and *mores*, and to what kind of ethics and *mores* do these rules refer?⁶¹

V. It follows from the preceding discussions that no branch of the traditional science of international law is more in need of reform than the doctrine of interpretation. The traditional doctrine has limited its efforts to transferring schematically the time-honored common and Roman law principles of interpretation to the international field. It has discussed the problem whether the wording of a treaty or the intentions of the parties shall be the main source of interpretation; it has gone deeply into the question whether preparatory materials may be used for purposes of interpretation; and it

⁶⁰ To this "cumulative" relationship, see *ibid.*, p. 185 *et seq.* To the following discussion see the general theoretical explanations, *ibid.*, p. 155 *et seq.*; and the remarks referring to them by Timasheff, *op. cit.*, pp. 62, 83, 84, 272, 324.

⁶¹ The aforementioned papers by Friedman and Schwarzenberger (*supra*, notes 4, 25) are a promising beginning in this direction.

has advanced a great variety of so-called "rules of construction." Yet it has completely overlooked the fact that, due to the peculiar relationship between social forces and rules of international law, the problem of interpretation in the international field shows unique aspects for which the traditional civil law technique of interpretation is utterly inadequate.

When in the domestic field the meaning of a contract is ascertained by the usual means of interpretation, the interpretative job is done. It is generally not too difficult to perform the same task with regard to an international treaty; but then the real problem of interpretation just begins. A contract of civil law generally uses standardized language whose legal meaning is definite, or at least can be ascertained according to objective, universally recognized characteristics. An international treaty is not necessarily of the same nature. Its real meaning may be disguised with diplomatic language so that its wording is indicative only of what it does not mean. Under such circumstances, it is only from the social context that this treaty will receive its meaning. The political situation of the parties, and their intentions with respect to this situation, have to be ascertained from the viewpoint of the subject-matter of the treaty in question, for the time of the conclusion of the treaty as well as for the time of the interpretation; for, as we have seen, the legal meaning of an international treaty is ever subject to change. From this analysis one may then conclude, in a laborious and always highly uncertain manner, what might be the probable objective of the treaty and the legal meaning of the particular stipulations serving this purpose.

What, for instance, does the term "independence" in an international treaty mean? Its meaning may coincide with the accepted meaning of the term, it may be somewhat different, it may be the exact opposite, or it may have no legal meaning at all. The rules of construction will be of no avail with respect to this problem. It is only from the background of the social context and of the function the treaty is supposed to fulfill within it, that a scientific interpretation can hope, at least within certain limits, to receive a satisfactory answer. The answer will, for instance, vary according to whether the state to which the term applies is a colonial, semi-colonial, or non-colonial country; whether the treaty is concluded between two states of equal or different political power; whether or not in the last alternative, the more powerful state has imperialistic intentions with respect to the other party; whether the treaty is of a bilateral nature, pursuing a specific political aim, or is supported by the consensus of a great number of states for the sake of a general purpose common to all of them.

VI. To fulfill its task, the functional theory of international law has to take another step beyond positivism. It was the assumption of the positivist concept of science to be more scientific than any previous approach to an understanding of things. Positivist science was supposed to be free from all metaphysical elements, not asking how things ought to be and what their "real" essence might be, but seeking only uniform relations between things

verifiable in experience. "*Je ne propose rien, je ne suppose rien, j'expose,*" was Comte's device. But just as Comte ended in the metaphysics of his "religion of humanity," so juridic positivism was not satisfied with knowing what the law actually was and how it worked. It was only too eager to remodel the world of the law after idealistic assumptions whose universal validity the respective authors took for granted. This tendency, variously strong in the different branches of municipal law, is uppermost in the positivist doctrine of international law. The science of international law, completely absorbed by practical problems as to what the rules of international law should be, is paying almost no attention to the psychological and sociological laws governing the actions of men in the international sphere, nor to the possible legal rules growing out of such actions. Who would dare embark upon such research would be called "impractical," and the results of his studies, if ever mentioned at all, would be qualified as "worthless." Grandiose legalistic schemes purporting to solve the ills of the world have replaced the less spectacular, painstaking search for the actual laws and the facts underlying them. This presumptuous enterprise has contributed nothing to the betterment of international relations, let alone the knowledge of what these international relations actually are. It has only shown the utter futility of all attempts to reform human conditions on the basis of idealistic assumptions without knowing the laws under which these conditions stand. As William Graham Sumner put it:

In this view, the worst vice in political discussions is that dogmatism which takes its stand on "great principles" or assumptions, instead of standing on an exact examination of things as they are and human nature as it is. . . . The social sciences are, as yet, the stronghold of all this pernicious dogmatism; and nowhere does it do more harm than in politics. The whole method of abstract speculation on political topics is vicious. It is popular because it is easy; it is easier to imagine a new world than to learn to know this one; it is easier to embark on speculations based on a few broad assumptions than it is to study the history of states and institutions; it is easier to catch up a popular dogma than it is to analyze it to see whether it is true or not. All this leads to confusion, to the admission of phrases and platitudes, to much disputing but little gain in the prosperity of nations.⁵²

"The eagerness for premature practical application . . .," to express the same thought in the words of Vilfredo Pareto, "is ever obstructing the progress of science, along with a mania for preaching to people as to what they ought to do—an exceedingly bootless occupation—instead of finding out what they actually do."⁵³

Why, then, is it that the field where the social sciences are able to work successfully is much narrower than the corresponding field of the natural

⁵² "Democracy and Responsible Government," in *The Challenge of Facts and Other Essays* (New Haven, 1914), pp. 245, 246.

⁵³ *The Mind and Society*, Vol. 1 (New York, 1935), p. 185.

sciences? It is again Sumner who knows an answer to this question. "The reason is because the elements of any sort of problem which we do not know so far surpass in number and importance those which we do know that our solutions have far greater chance to be wrong than to be right."⁶⁴ Thus, the problem which the science of international law has to solve is clearly set. The natural sciences had to discover the laws governing nature before they could hope to dominate the natural forces, to prevent the dangers emanating from them, and to use them for human aims. In the same way, the social sciences cannot hope to master the social forces unless they know the laws which govern the social relations of men. In the natural sciences, the discovery of the infinitesimal calculus by Newton and Leibniz was bound to precede many modern technical inventions. The millennial attempts at constructing the airplane could not succeed as long as Carnot had not established his purely theoretical propositions on thermodynamics. Were it not for the theoretical efforts of Faraday, who himself did not invent anything of practical value, there would not be today any of the multiple uses of electricity for practical purposes. Had not Maxwell and Hertz, without any practical objective, carried out certain "abstruse and remote" calculations in the field of magnetism and electricity, Marconi could never have invented wireless and the radio.⁶⁵

The science of international law, as well as the social sciences in general, are still awaiting their Newton, their Leibniz, their Faraday, their Carnot, their Maxwell, and their Hertz. To expect the contemporaneous lawyer to be an "engineer" or "technician" of the law means to expect Edison before Faraday, Wright before Carnot, Marconi before Maxwell and Hertz. And this is certainly a futile expectation. The great task which lies before the social sciences is to prepare the work of the latter so that the former can build upon it. By joining them in this endeavor the functional theory of international law will not only fulfill the task of any scientific doctrine, that is, to know what is and why it is; it will also prepare the ground for satisfying the greater ethical and political desire to improve international relations by means of the law.⁶⁶

⁶⁴ "Speculative Legislation," *op. cit.*, p. 219.

⁶⁵ For the relationship between theory and practice in the natural sciences, see Meyerson, *La Déduction relativiste* (Paris, 1925), p. 333 *et seq.*; *Identité et Réalité* (Paris, 1926), pp. 36, 37; *Du Cheminement de la Pensée*, Vol. 1 (Paris, 1931), p. 3 *et seq.*; Flexner, "The Usefulness of Useless Knowledge," *Harpers* (October, 1939), p. 544.

⁶⁶ A highly illuminating discussion of the problem, only hinted at in the text, is to be found in Professor Hankin's paper, "Social Science and Social Action," *American Sociological Rev.*, Vol. 4 (1939), p. 1; see also, Professor Lundberg, "Contemporary Positivism in Sociology," *ibid.*, p. 52 *et seq.* The problem is stated with intuitive insight by Lincoln Steffens in his letter of June 18, 1919, to Laura Suggett (*The Letters of Lincoln Steffens* (New York, 1938), Vol. 1, p. 472), picturing Wilson in Paris: "He is righteous. If only he were intelligent, scientific! But the unmoral, scientific, intellectual type is for the next generation to produce. Our part is to use the transition period to raise the questions, point away from all persons and individual guilt to the physical and economic enemies of Man."

EDITORIAL COMMENT

INTERNATIONAL LAW FOR FINLAND

From the time when at the close of November, 1939, Russian troops crossed the Finnish frontier on the Isthmus of Karelia until the Government of Finland in March, 1940, was compelled by the Soviet Government to surrender by treaty territory as well as naval bases and rights of transit, civilization witnessed the despoilment of a blameless and independent people.¹ The lawless character of the achievement was perceived in nearly every foreign quarter. Russia's contempt for its numerous and well-defined treaty obligations towards its victim, as well as towards the League of Nations, was duly appraised and speedily condemned at Geneva.² The factual situation productive of that condemnation was revealed in documents on which the Assembly and Council based their conclusions. Their action was, of course, not equivalent to the judgment of an international tribunal. It was, nevertheless, a verdict fortified by strong evidence of guilt of the invasion without cause of the domain of an unoffending state; and the invader failed to offer a convincing excuse for what it did. Practically, it defaulted. This aggravated the shock to the outside world.

With the widespread and confident assumption that the Soviet Government lawlessly seized territory belonging to a weaker neighbor, there necessarily arises the corresponding inquiry whether the seizor is to be allowed

¹ Declared certain intellectual leaders of Sweden (embracing Dr. Hjalmar Hammarskjöld and Dr. Östen Undén) in an Appeal from Sweden for Finland, issued by the American-Scandinavian Foundation, March 1, 1940: "Finland's shield is untarnished. Without the slightest provocation, with a barefaced lie as an excuse, the Soviet dictators ruthlessly threw their hordes against a peaceful little neighbor. Never has a cause been clearer; never has a nation fought a more just war of defense than Finland is waging against the rapacious Russian giant. This is a struggle of life and death for the people of Finland and all of northern Europe. To be incorporated in Soviet Russia's 'living space' signifies not only the loss of freedom and independence for a conquered state. It means a complete annihilation and extermination of its spiritual and political leaders and the guardians of its entire social organization. For large masses of the people it means deportation and exile, living under terror, or death. For a conquered people the Soviet living space represents the graveyard of national culture, the chamber of death itself. Finland's defense against Soviet aggression involves more than the fate of its brave little people, more even than the continued existence of Finland and Scandinavia. Finland is fighting for an order of human justice against barbaric violence for everything enduring and valuable in the cultural development of the world; and for what forces shall be the determinants of the further development of humanity."

² See Report of the Assembly, provided for in Art. 15, paragraphs 4 and 10, of the Covenant, submitted by the Special Committee of the Assembly, Dec. 13, 1939, League of Nations Official Journal, November-December, 1939, p. 531; also resolution adopted by the Council, Dec. 14, 1939, finding that by its act the Union of Soviet Socialist Republics had "placed itself outside the League of Nations," and declaring that it followed that that country was "no longer a member of the League." (*Id.*, pp. 506 and 508.)

by the international society to keep what it wrung by force from a country that merely struggled to safeguard itself against plunder.

Will the international society be satisfied with the traditional contention that as an impeccable treaty registers Finnish accord,³ the validity of the arrangement is not to be challenged? Will it be content to accept the fiction that the formal acquiescence wrung from Finland robs it of the right to charge Russia with a wrongfulness of action that taints the fruits of its achievement? Will it doubt that Finland may be expected to feel no obligation to respect the agreement beyond the hour when Soviet authority is able or disposed to render repudiation dangerous? These inquiries are, however, merely subsidiary to a larger one the response to which concerns the maintenance of justice in every land—Is international lawlessness to be permitted to demolish legal rights and to create out of the wreckage fresh and adverse privileges that are worthy of respect? To put it differently: Is the law of nations to be allowed to crumble and to be supplanted by a system that ascribes legal rights to the sheer and sole power of the powerful?

In considering the legal aspect of what has taken place it needs to be realized that the question concerning the effect of duress or compulsion upon the validity of a treaty, even as tested by accepted standards of state conduct, loses its importance as a decisive factor in the solution of the larger problem whether a state may invoke the benefits of a treaty to disguise the color of forbidden acts. It may be difficult indeed to find instances where the parties to a treaty have been ready to acknowledge that they agreed to do what international law forbade. That circumstance does not, however, weaken the contention that when a treaty is designed and in fact employed by the parties, or by the party controlling the fate of negotiations, as the means of accomplishing an internationally illegal end, it is void.⁴ Regardless of the minds of the signatories, the law of nations cannot attach a legal quality to an agreement that is contemptuous of the injunctions of that law. When, moreover, a treaty is of such a kind, non-signatory states whose interests are deemed to be impaired by the arrangement may intervene without impropriety, and denounce as valueless as against themselves whatever internationally illegal accomplishments the agreement purported to sanction.⁵

One must not, of course, in the year 1940, ignore practices of the present century that reveal victorious belligerents as zealous to incorporate in treaties of peace the fruits of conquest without a sense of legal obligation to pursue a

³ For an unofficial text of the Russo-Finnish agreement from the United Press, see New York Times, March 13, 1940, p. 2.

⁴ Accordingly, it is believed that, in such a case, either party to the arrangement may set up invalidity as an excuse for non-performance, and that, regardless of whether the perfecting of the agreement was due to compulsion.

⁵ It is unnecessary to marshal the numerous instances where outside states have maintained that no accord between the contracting parties could, without the consent of the former, diminish their legal rights.

more lenient course.⁶ Outside of the Western Hemisphere the seeds of self-determination have fallen upon rocky soil.⁷ Their growth has been stunted and their influence distorted by a variety of untoward circumstances. Aggressive states have at times sought by the sword to recover territory wrested from them. Claims arising from the alleged failure of a territorial sovereign to maintain justice within its limits have inspired the foreign effort to acquire areas said to have been inadequately controlled. (Doubt as to the validity of the pretensions of a state to sovereignty over areas possessed by it, challenges of the basis of its title, impropriety or insufficiency of its control thereof, as well as sheer lust for territory, have combined to produce confusion of thought, disregard of principle and recourse to arms.) This has been notably the case when war has ensued and the successful belligerent has seized the opportunity to reap the rewards of victory. Such lapses have not, however, changed the color of lawless conduct when it has taken place; and they have not weakened the soundness of the protests of the victims of such conduct.

What stands out in the case of Finland is an absence of conflicting equities on an almost equal plane rendering doubtful the final appraisal of the scales of justice. No action on its part excused the invasion of its domain. Of the creation and existence of Finland as an independent state, whose sovereignty extended over the area which it controlled, the Soviet Government was not in a position to make complaint.⁸ Finland had not failed in the adminis-

⁶ See "Conquest Today," by this writer, this JOURNAL, Vol. 30 (1936), p. 471.

⁷ It will be recalled that in 1933 the American Republics through Art. 11 of the Convention on Rights and Duties of States, concluded at the Seventh International Conference of American States, made the following declaration: "The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily." (United States Treaties, Vol. IV, p. 4809.)

Again, by Art. 1 of the Treaty for the Fulfillment of Existing Treaties between the American States (United States Treaties, Vol. IV, pp. 4831, 4833), it was declared that as between the contracting states "they will not recognize any territorial arrangement not obtained by pacific means, nor the validity of the occupation or acquisition of territories brought about by force of arms."

See also the declaration of Mr. Stimson, Secy. of State, Jan. 7, 1932, in the course of the Sino-Japanese conflict in Manchuria, Dept. of State Press Releases, Jan. 9, 1932; this JOURNAL, Vol. 26 (1932), p. 342.

⁸ According to the Report of the Assembly of the League of Nations of Dec. 13, 1939: "The Treaty of Peace signed at Dorpat on October 14, 1920, between Finland and the Russian Socialist Federal Soviet Republic recalls in its preamble that in 1917 Finland was proclaimed an independent state and that Russia had recognized the independence and sovereignty of the Finnish State within the frontiers of the Grand-Duchy of Finland. This treaty fixes, *inter alia*, the frontier 'between the States of Russia and Finland,' the limit of the territorial waters of the contracting Powers, the military neutralization of certain Finnish islands in

tration of justice therein, or inadequately responded in that regard to the requirements of international law. Through a series of agreements with its neighbor, Finland had seemingly buttressed itself against Soviet acts of aggression, and in particular against recourse by it to non-amicable modes of adjusting controversies.⁹ Nor did Finland violate any legal duty towards Russia in declining in 1939 to yield to its concessions of or within Finnish soil. It will be recalled that even after the entry of Russian troops into Finnish territory, the Finnish Government announced a willingness to accept the good offices extended by the Government of the United States for the solution by peaceful processes of the controversy that had come into being.¹⁰ The final resort to arms by Finland was forced upon it by the invader which decided to achieve by the sword what could not be wrought by diplomacy. The territorial sovereign found itself obliged to employ military force to save its life as an independent state as well as its territorial possessions.

It is in the light of such conditions that the character of the conduct of the invader revealed itself. The nature of the revelation presses upon the international society the inquiry made above, and calls for a definite answer. If something akin to, or to be respected as though it were, a legal right, is to be acknowledged to accrue to Russia as the result of its achievement, the implications are vast and terrifying. They necessitate the conclusion that the territory of a law-respecting independent state is inviolable and not an appropriate object of military occupation and seizure only until the hour when a strong and covetous neighbor otherwise decrees, and that, accordingly, the right of such a state to defend its territorial integrity and independent character is to be measured by its physical and military power to do so. It matters not how glaringly such a conclusion contrasts with supposedly accepted tenets of international law. What counts at the present moment is the grim fact that that conclusion is inevitable unless the international society, unorganized though it be, pulls itself together and determines not to let the invasion of Finland stand, and not to let the invader retain what the treaty of Moscow yielded. Persistent non-recognition of the concessions set forth in it is of course essential; but more is needed. The price for the maintenance of international law may be a heavy one to be shared and felt by all civilization; and in the present case a strong Russia has by its conduct towards Finland pointed to the extent of it. It must be paid.

CHARLES CHENEY HYDE

the Gulf of Finland, etc." (League of Nations Official Journal, November-December, 1939, p. 536.) See also, M. W. Graham, *The Diplomatic Recognition of the Border States*, Part I, Finland (University of California Press, 1935), Chap. II.

⁹ See Report of the Assembly, cited above, League of Nations Official Journal, November-December, 1939, pp. 536-538.

¹⁰ See Dept. of State Bulletin, Dec. 2, 1939, p. 610.

WAS NORWAY DELINQUENT IN THE CASE OF THE ALTMARK?

On February 14th a German steamer, the *Altmark*, entered Norway's territorial waters with the intention of skirting the Norwegian and Swedish coasts until she reached a German port. (She had on board some 300 British seamen taken from vessels captured and sunk by the German battle cruiser, *Admiral Graf von Spee*.) (The *Altmark*, formerly a merchant tanker but now a naval auxiliary flying the German official service flag (*Reichsdienstflagge*),¹ ~~had sailed from the south Atlantic to the coast of Norway~~ and we may assume that her preference for Norwegian territorial waters was motivated by a desire to seek the safety of those waters.) (She was hailed by a Norwegian torpedo boat shortly after entering Norway's territorial waters.² She was apparently armed with two, possibly three, small anti-aircraft guns, but these, the Norwegian Foreign Minister reported, had been dismantled before the ship entered territorial waters.) In response to a question, the captain of the *Altmark* replied falsely that she was on her way from Port Arthur, Texas, to Germany. Some distance farther south the *Altmark* was again hailed by another Norwegian torpedo boat and asked whether there were any persons on board belonging to the armed forces or the merchant marine of any belligerent country. To this question the captain of the *Altmark* falsely answered "no." A little farther on, the *Altmark* was again hailed by a Norwegian warship north of Bergen—~~not in the port of Bergen as was first reported~~. This time the captain refused to have his ship searched on the ground that she had already been visited. (On the evening of the 16th, word of her presence having been conveyed by British airplanes to British destroyers, she was forced into Joessing Fjord by the British destroyer *Cossack*, apparently over the protest of two Norwegian war vessels, and the 300-odd captives were removed and taken to England.) (The British Government justified its action by charging Norway with a breach of her international neutral duties. This the Norwegian Government denied. The case created considerable excitement) not least of all among a few American lawyers who immediately gave expression to their opinion that Norway was in the wrong in having failed to determine the true status of the *Altmark* as a supply ship, that it was an "altogether unneutral act" of Norway to permit the German crew of the *Altmark* to harbor British prisoners in Norwegian waters.) That if the *Altmark* had put into New York harbor we [the United States] would not have stood for it, and that this was like taking prisoners in chains by train from New York to San Francisco. (It was also charged⁴ that the *Altmark* "in applying for entry to

¹ Only vessels employed by the government for public purposes are permitted to fly this flag. Decree of Oct. 31, 1935, *Reichsgesetzblatt* I, 1288. It is, however, distinct from the war flag.

² Official radio statement of Norwegian Foreign Minister, Feb. 25, 1940. New York Times, Feb. 26, 1940.

³ New York Times, Feb. 19, 1940.

⁴ By James W. Ryan, New York Times, Feb. 25, 1940.

Norwegian waters concealed the material fact that [the] vessel was not merely a public vessel . . . but was also temporarily engaged in acting as a prison ship . . . ,” that the *Altmark* “was menacing the safety and freedom of innocent British sailors who were within Norwegian territory) (The Norwegian Government was not only doing nothing to remove this danger, but was actually affording the vessel an escort of two Norwegian gunboats” and “was guilty of a breach of neutrality toward Great Britain by voluntarily permitting innocent British civilians to be incarcerated by force within its territory.” It was charged that Norwegian officials were under a duty to board the *Altmark* and to discover “the presence of the British prisoners and the variance between the ship’s papers and the service the vessel was actually performing.” It was therefore concluded that “the *Altmark* was not in Norwegian territorial waters from necessity but because she desired protection from attack by British vessels while proceeding to Germany. A neutral country is under no duty to permit belligerent public vessels to use its territorial waters for such a purpose.) The confusion was not dissipated by another opinion⁶ to the effect that she was a “tank ship,” used as an “inhuman prison,” and, whether “a warship or merely a supply ship,” not entitled to “claim extraterritoriality in Norway’s waters so as to function therein as a prison ship.” It was therefore charged that “Norway was conniving at the violation of her neutrality” (and that the British commander had proceeded “to vindicate not only Great Britain’s rights as a belligerent but Norway’s own neutrality!”)

(An examination of the law on the issues involved warrants no such conclusions. Assuming that the *Altmark* was a public vessel of Germany, the question whether Norway observed her neutral duties, the only question to be here discussed, seems not especially difficult. It is clear that belligerents are bound to commit no hostile act in neutral territory or territorial waters.⁶ The question is, then, was the act of the *Altmark* in proceeding through Norwegian territorial waters with captured British seamen on board, concealing that fact from a Norwegian torpedo boat, falsely stating her port of origin and refusing to permit search, plus Norway’s failure to discover the seamen and release them, a breach of Norway’s neutral rights by the *Altmark* or of neutral duties by Norway herself?)

(On principle and authority the answer seems to be “no.”) (Acts of hostility are confined to combat, capture, exercise of the right of search, use as a base of naval operations, and similar affirmative acts of war,⁷ but exclude passage

⁶ Maurice Leon in the *New York Times*, March 10, 1940.

⁶ Arts. 1 and 2 of Hague Convention XIII, Reports to the Hague Conference (edited by Scott), p. 841.

⁷ Hague Convention XIII, Art. 2. Cf. Oppenheim, *International Law*, 5th ed. by Lauterpacht (London, 1935), II, p. 569 et seq.; Gidel, *La mer territoriale*, 1934 lecture, Academy at The Hague, *Recueil*, II, pp. 209-10, 223-225; Genet, *Droit maritime pour le temps de guerre*, II, pp. 82-84; Hall, *Law of Naval Warfare* (1921), p. 131; Naval War College, *International Law Situations*, 1931, pp. 107-108; Peydière, *Du Séjour et des droits des navires de guerre*

through territorial waters even with prisoners on board.⁹ Confusion seems to have been created by the fact that Norwegian torpedo boats at least twice stopped the *Altmark* and asked questions as to her character and as to her cargo. That creates the inference that Norway was obliged to ask the questions and establish the truth. But if it is a fact that the *Altmark* was a public vessel—and no great difference would result if she were a private vessel—Norway was neither under a duty nor privileged to inquire as to the cargo or passengers on board, and even if she had known their true character, to release them from captivity.¹⁰

The critics above mentioned apparently proceed from the assumption that territorial waters are like land or an inland sea or river, and that belligerent privileges and neutral duties in territorial waters are controlled by land tests. But this is a misconception. (Territorial waters are free channels of communication, and the mere transportation of prisoners through them is not a breach of neutrality or a hostile act if the coastal state permits passage at all.) (Unlike merchant ships, which have an absolute right of passage, warships may be excluded from territorial waters by a neutral.) Klean⁹ in 1898 strongly argued for the absolute character of the prohibition. But (the Hague Conference of 1907 gave the coastal state a privilege to admit or exclude warships from territorial waters as it thought best.) (Article 10 of Convention XIII provides:

The neutrality of a Power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents. (Italics supplied.)

This article, as the reporter, Professor Renault of France, points out,¹⁰ finds its source in a British proposal to the conference to the effect that "none of the provisions contained in the preceding articles shall be interpreted so as to prohibit the mere passage through neutral waters in time of war by a warship or auxiliary ship of a belligerent." (Professor Renault's report adds:

belligerents (1936), pp. 70-71. Even the convoy of troops is privileged, unless it be so continuous as to become a place of concentration. Sandiford, Roberto, *Diritto marittimo di guerra*, 5th ed. (Rome, 1938), p. 303.

⁹ Even passage through, *animo capiendi*, is privileged. *The Twee Gebroeder*, 3 C. Rob. 162. Hague Convention XIII, Art. 10, permits prizes, including crew, to be taken through territorial waters. If a ship has been captured, it may, on its way to a prize port, pass through or even anchor temporarily in territorial waters. *The Thorsten*, No. 1, *Oberprisen-gericht*, I, 103 (1916); *Reserv*, *ibid.*, 392 (1917, anchoring); *The Südmark*, Br. and Col. Prize Cases, 473, 478 (1916). Mercker, R., *Die Küstengewässer* (Stuttgart, 1927), p. 75. The use of the *Altmark's* radio was not privileged, but the sanction was for Norway to determine.

An escort to assure free passage in territorial waters is approved practice. Cf. Chilean cases in Alvarez, *La grande guerre européenne et la neutralité du Chili* (Paris, 1915), pp. 163-165. Martin, *Latin America and the Great War* (1925), p. 277. Hague Convention XIII, Art. 11, permits the supply of licensed pilots.

¹⁰ *Lois et usages de la neutralité* (Paris, 1898), I, p. 507 et seq.

¹¹ Reports to the Hague Conferences, p. 847.

The passage through neutral territorial waters of warships or prizes belonging to belligerents does not affect the neutrality of the state, and this implies at the same time that the belligerents do not contravene neutrality by passing and that the neutral does not fail in his duties by permitting them to pass.

Pursuant to the option afforded by Article 10, most states including Norway, have given warships the privilege of passing through territorial waters.¹¹ Some, like Norway in its proclamation of May 13, 1938, permit such passage, except to submarines, or require submarines to navigate on the surface.¹²

(The British observations of May 23, 1939, on Norway's neutrality regulations, read in this respect as follows:

While His Majesty's Government do not deny that there may in special circumstances be a right to refuse to belligerent warships entry into neutral territorial waters, they have always maintained and must continue to maintain the existence of such a right of entry for purposes of innocent passage and they are not aware of any case in which it has been refused by neutrals to belligerents for this purpose.)

As a public ship the *Altmark* was free from visit and inspection except possibly to verify her conformity with Norway's neutrality regulations.) Norway's jurisdiction over the vessel was at best extremely limited and under no circumstances would it seem that Norway was privileged to break the relation between the master and the captives on board and release them. Even if the ship had anchored or docked in Bergen, that legal relationship could not have been legally broken. (In the Franco-Prussian War, a French war vessel entered the Firth of Forth with German prisoners on board, whereupon the German Consul at Leith asked Great Britain to release the prisoners in accordance with Britain's alleged neutral duty. (The British Government replied that the French warship was privileged to enter and to remain for a limited time, that the prisoners on board did not become free, that while on board they were under French jurisdiction, and that the neutral authorities had no right to interfere with them.) (In an earlier case arising during

¹¹ The following countries permit the passage or entrance of belligerent warships: United States, U. S. Naval Instructions, 1917; Japan, Deák & Jessup, *Neutrality Laws, Regulations and Treaties*, I, p. 736; Italy, *ibid.*, I, p. 723, but see *ibid.*, p. 727; Brazil, Decree No. 1561, Sept. 2, 1939, Pan American Union, *Law-Treaty Ser.* 12, p. 21; also Deák & Jessup, *op. cit.*, I, p. 87; Greece, *ibid.*, I, p. 675; Belgium, *Moniteur Belge*, Sept. 3, 1939, *Rev. des lois*, etc., pp. 213-214; Scandinavian Regulations (1939), 15 *Rev. des lois*, etc., pp. 214-217; Ecuador, Deák & Jessup, *op. cit.*, I, p. 554; Venezuela, *ibid.*, II, p. 1292. Cf. national rules in Genet, *op. cit.*, pp. 86-87; Harvard Research in International Law, *Territorial Waters*, Art. 14 (1929), p. 295. The Netherlands prohibits entry, Deák & Jessup, *op. cit.*, II, p. 802. Cf. Genet, II, pp. 87-88; Scott, *Reports to the Hague Conferences* (1917), pp. 847-848, 869.

¹² Söderquist, *Droit int. maritime suédois* (1930), p. 62.

¹³ Press Release, Min. of For. Affairs, Oslo, Feb. 21, 1940, *Aftenposten*, Feb. 22, 1940.

¹⁴ The whole answer reads as follows:

"I am commanded by my Lords Commissioners of the Admiralty to communicate to

C.U.

the Crimean War, Attorney General Cushing ~~in an exhaustive opinion~~ held that a United States court had no power to release the captive seamen on board the Russian vessel *Sitka* brought into San Francisco as a prize by a British man-of-war.¹⁵

Nor is it material what the *Altmark's* papers showed, provided she was a public vessel. (Even if she were a merchant vessel, Norway as a coastal state had no power to punish her for carrying false papers, or, in either event, for the false character of the captain's answers to the questions put.) The British seamen were not technically prisoners of war because they were not part of the armed forces of a belligerent nor ancillary thereto.¹⁶ (Even if it should be said that the *Altmark* was violating international law by taking them to Germany¹⁷ instead of leaving them at the nearest port, it was hardly Norway's duty to correct the violation.¹⁸) The term "prison ship" is not a term of

you, for your information and guidance, the following occurrences which have taken place with reference to the observance of neutrality, and the legal opinions which have been furnished to Her Majesty's Government in each case:

"1. A French vessel-of-war having entered the Firth of Forth with German prisoners on board, and the attention of Her Majesty's Government having been called by the Consul of the North German Confederation at Leith to the circumstances, as a breach of neutrality on the part of this country, Her Majesty's Government was legally advised as follows:

"First, that the French war-ship had a right to enter the Firth of Forth, and remain there during such time, and for such purposes, as are allowed to belligerents in the present war under Her Majesty's Proclamation.

"Secondly, with regard to the assertion of the North German Consul, that the German prisoners on board the French war-ship were, *ipso jure*, free, as the ship was in neutral waters; that there is no warrant in the law of nations for such a position. So long as the Germans remained on board the French war-ship they were under French jurisdiction, and the neutral authorities had no right to interfere with them. If they had been landed from the war-ship the question raised would have been different, as they would have passed out of French jurisdiction, and have become practically free.' "

Fontes Juris Gentium, Digest of Diplomatic Correspondence, 1856-1871, Vol. II, Document 2928.

¹⁵ 7 Opinions of the Attorney General, p. 123. See also Oppenheim, 5th ed., II, p. 591. That prisoners remain such on entrance into port on board warships and cannot be released, see Luchaire, *Droits de séjour et d'action des navires belligérants dans les eaux territoriales neutres* (1933), pp. 204, 206. Hall, *Naval Warfare*, p. 175; Genet, *op. cit.*, II, pp. 180-181. There is, of course, a limit to the use of neutral ports for asylum. If the belligerent overstays its permitted sojourn, it may be interned and prize or captives released. Pitt Cobbett, *Leading Cases*, 4th ed., II, p. 1494.

¹⁶ Hall, *Naval Warfare*, p. 116; Meitani, "*Le régime des prisonniers de guerre*," 7 *Rev. Int. fran. de droit des gens* (1939), p. 292; Rasmussen, *Code des prisonniers de guerre* (1931), pp. 25-26; cf. Geneva Convention, 1929, Art. 1, and Hague Regulations, 1907, Arts. 1-3; Rasmussen, pp. 108-109; Söderquist, *op. cit.*, p. 395. The crew of an armed merchantman may be treated as prisoners of war. Cf. Sir Edward Carson in 93 *Parl. Deb.* (5th ser.), p. 310 (May 2, 1917).

¹⁷ An Associated Press dispatch of March 9th reports the landing in England of more than 100 German seamen, members of the crew of scuttled and captured German vessels. *New York Times*, March 10, 1940.

¹⁸ Cf. Baty: "The assumption that a neutral must absolutely guarantee the observance of

art and hardly clarifies the legal position. The *Altmark* would seem to have been under no duty to account to Norway for what she was carrying, nor was Norway bound to inquire whether she was passing through territorial waters to escape capture. Such a motive, which was doubtless accurate, does not diminish the privilege of using the territorial waters for transit.

Greatly as one may sympathize with the irresistible temptation of the British destroyer to release the captives on the *Altmark*, it is not easy to perceive any violation on Norway's part of her neutral duties.)

EDWIN BORCHARD

THE CROMWELL INCIDENT

Honorable James H. R. Cromwell, our recently appointed Minister to Canada, made a public address at Toronto on March 19, in the course of which he said:

As Minister of the United States, I am pledged to a policy of neutrality. As you know, this policy has the active support of the overwhelming majority of the American people. But, gentlemen, that is no good reason why we should not face the facts and weigh the issues which confront us. Considerable comment seems to have been evoked by a statement I made in Val d'Or ten days ago; to wit, that I believed the Allies were fighting for the perpetuation of individual liberty and freedom. Perhaps comment was occasioned because the diplomatic representative of a neutral nation expressed an opinion concerning the war aims of a belligerent Power.

Perhaps some people were surprised because they feel that the utterances of a diplomat should be confined to platitudinous pleasantries. Certainly that is the feeling of many of my countrymen, indeed of some of my very distinguished countrymen who, it would seem, believe the fulfillment of the handwriting on the wall can be avoided by pretending the handwriting is not there.

Well, my friends, that is not my idea of the functions of a diplomat. To me, a diplomat is still a citizen. The duty of every citizen is to uphold and defend the institutions and the social and economic order upon which the government of his nation is founded.

And, furthermore, when that diplomat-citizen—or, rather, let me call him a sentry at an observation outpost—when that sentry sees approaching a force which frankly and openly seeks to destroy those afore-said institutions and the social and economic order upon which the government of his nation is founded, then, it seems to me, it is the duty of that sentry to tell his fellow-citizens what he sees.

And, gentlemen, let me assure you that upon this interpretation of my duties as a diplomat I am content to risk my official head. If I be wrong, then let the executioner be summoned and wield his axe. Head chopping is just an old family custom with the Cromwells, anyhow!¹

the laws of war by each belligerent, on the pain of having her own rights disregarded, is a disquieting symptom." "The Supposed Chaos in the Law of Nations," 63 U. Pa. L. Rev. (1915), p. 716.

¹ New York Times, March 20, 1940.

The speech aroused angry criticism by certain members of Congress and demands that the Minister be recalled.³ In some quarters an abortive attempt was made to charge the President with prior knowledge and approval of the views expressed.³ The speech was made the subject of wide editorial comment as an illustration of the danger of the system of allowing considerations of campaign contributions to influence the appointment of wealthy amateur diplomats in place of the competent career men who have made such a good name for our service.⁴ The *New York Times* observed: "In a crisis or a war our State Department has trouble enough in steering its course without the added awkwardness of diplomatic speeches."⁵

When Secretary Hull was first questioned by representatives of the press, he answered that he had not read the speech, but on March 21 the Department of State released the following statement:

The Secretary of State has now examined the text of the address made at Toronto on March 19 by the American Minister to Canada, Mr. James H. R. Cromwell. Secretary Hull found that the address contravened standing instructions to American diplomatic officers, as public discussion of controversial policies of other governments, particularly with governments engaged in war, without the prior knowledge and permission of this Government, is not in accord with such instructions. Such public statements by our diplomatic representatives are likely to disturb the relations between this and other governments.

Secretary Hull has telegraphed his views to Mr. Cromwell and has asked that in the future he observe the standing instructions.⁶

³ Representative Sweeney introduced a resolution directing the Foreign Affairs Committee of the House of Representatives to conduct an investigation as to the truth of the reported statements and, if they were found to be true, that it be recommended to the President that the Minister be recalled. Congressional Record, March 20, 1940, pp. 4848-4849. Congressman Tinkham of Massachusetts and Senator Clark of Missouri were also reported as demanding Mr. Cromwell's recall. See Washington Post, March 24, 1940.

⁴ The attempt to show on the basis of an alleged "unimpeachable authority" that the President had received a copy of the speech prior to its delivery was met by a categorical statement from Presidential Secretary Early that the "unimpeachable authority" had been "deliberately invented." (March 24, 1940, cf. C.T.P.S. dispatch in the Washington Times-Herald of the same date.) Minister Cromwell issued a statement from his Fifth Avenue office in which he said:

"Published reports that President Roosevelt saw an advance copy of my Toronto speech or had any knowledge of its contents beforehand are made out of whole cloth. Such stories are absolutely untrue. The views which I expressed on the contrast between the principles of totalitarian and democratic forms of government and their results were made entirely on my own responsibility. Since that address, no one has at any time been given any reason or authority to express any views for me." (New York Times, March 24, 1940.)

⁵ Washington Times-Herald, March 21, 1940; cf. Washington Post, March 23, 1940.

⁶ March 23, 1940.

⁶ The Instructions to Diplomatic Officers of the United States, prescribed by executive order of the President, March 8, 1927, contain the following paragraph:

"Diplomatic officers should be careful not to allude in any public address to political issues pending in the United States or elsewhere." (Diplomatic and Consular Laws and Regula-

However laudable it may be for an American to express his convictions and openly to support the cause of international law and justice, a diplomatic representative must never forget that he does not speak as an individual, but as an instrument of his country and that he is in loyalty bound to follow the lead and the instructions of his superior and responsible officers, the Secretary of State and the President. In a circular of instructions issued to our foreign representatives, Secretary Seward, referring to public addresses, stated that "the utmost caution must be observed in touching upon political matters."⁷ An early writer of the sixteenth century, Alberic Gentilis, observes: "The Ambassador should keep in mind the fact that he is doing his duty most when he is keeping within the limits of that duty. . . . In cases where definite instructions have been given, ambassadors should not be allowed to diverge even a finger's breadth from them."⁸

The Cromwell incident recalls another in which Honorable Charles R. Crane, appointed Minister to China by President Taft, was recalled when en route to his post because of remarks which Secretary Knox considered indiscreet. He was, however, later appointed to the same post by President Wilson. The case of Mr. Bayard, when Minister to Great Britain, was not on all fours with this because he did not discuss the policy of other states. In an address made before the Philosophical Institute of Edinburgh he made a vigorous attack upon the protectionist policy.⁹ This gave rise to criticism in Congress and a demand for his recall, but in that instance he voiced the views of his Administration in a matter of domestic policy. It was formerly considered of doubtful propriety for a diplomat to indulge in such criticism. Today such procedure, although unusual, would not probably be considered as improper.

Over two centuries ago Monsieur de Callières in his incomparable study of diplomacy observed:

Diplomacy is a profession by itself which deserves the same preparation and assiduity of attention that men give to other recognized professions . . . and those who think to embark upon a diplomatic mission as a pleasant diversion from their common task only prepare disappointment for themselves and disaster for the cause which they serve.

And in reference to appointments he adds:

There is always a risk that a minister in search of an Ambassador for a foreign post will use the occasion to pay an old debt to some powerful patrician family or to some blackmailer behind the scenes.¹⁰

tions of Various Countries, edited by A. H. Feller and Manley O. Hudson (Washington, 1933), Vol. II, p. 1276.)

⁷ Moore's Digest of International Law, Vol. IV, p. 575.

⁸ Gentili, *De legationibus*, Book II, Ch. XVI, as quoted in James Brown Scott, *Law, The State, and the International Community* (Columbia University Press, 1939), Vol. II, p. 270.

⁹ Moore's Digest of International Law, Vol. IV, p. 575.

¹⁰ Callières, *The Practice of Diplomacy* (English rendering, London, Constable & Co., 1919), pp. 56-58.

If in this passage we substitute "campaign contributor" for "blackmailer" we shall bring the passage down to date as instanced by the regrettable practice of both of our political machines in quest of financial support for their party campaigns.

ELLERY C. STOWELL

THE MEXICAN SUPREME COURT DECISION IN THE OIL COMPANIES
EXPROPRIATION CASES

The Mexican Supreme Court, by its decision of December 2, 1939,¹ sustained the constitutionality of the Expropriation Law of 1936, and with certain modifications, the expropriatory decree of March 18, 1938, under which all the Mexican property, real and personal, of the foreign oil companies was expropriated. One of the four justices of the Third Chamber by which the decision was rendered, dissented so far as concerned the personal property of the companies. The court modified the decree to the extent of ordering a return to the companies of certain personal property of the companies, constituting private documents and part of their current assets.

It is necessary to divest the very lengthy and involved opinion of the court of much of its discussion relating to matters of a procedural and administrative character, in order to arrive at the essence of the decision. The court swept aside various barriers interposed by the Government to a consideration of the principal constitutional questions. Thus the court overruled the findings of the lower court that the record did not permit the oil companies to take advantage of a writ of amparo in order to challenge the constitutionality of the Law of 1936, and the presidential action by decree taken under it. The decision may, therefore, be regarded as the final decision of the highest judicial authority of Mexico relative to the expropriations complained of. This is of primary concern from the point of view of international law. The Supreme Court manifestly intended the decision to be final and unequivocal and, in this connection, reversed the lower court on certain of its conclusions of a procedural and jurisdictional character.

It should be made clear that the Supreme Court limited the executive authorities in respect of their power to expropriate so much of the personal property belonging to the companies as was not essential to the carrying on of the oil industry as such. Thus the expropriation of cash on hand and in bank, and also of certain securities belonging to the companies, was voided and the property ordered to be returned to the companies, "for neither does the expropriatory decree authorize it nor would it have been constitutional if it had so ordered." The court pronounced it to be error to hold that a sum of money received in cash may be paid for in deferred payments by means of compensation. The court likewise ordered the books of account of the companies, together with documents such as invoices, checks, drafts and other

¹ The references herein are to a translation made available by the United States Department of State.

papers which had been seized by the administrative authorities, returned to the companies, because the seizure was in violation of the individual guarantees granted by Article 16 of the Constitution. On the other hand, the seizure of oil already brought to the surface was sustained.

We proceed now to a consideration of the main issue, the constitutionality of the Expropriation Law of 1936. Article 27 of the Constitution of 1917 provides in part as follows:

Article 27. The ownership of lands and waters comprised within the limits of the national territory is vested originally in the Nation, which has had, and has, the right to transmit dominion thereof to private persons, thereby constituting private property.

Private property shall not be expropriated except for reasons of public benefit and by means of indemnification.

A reading of this text alone would lead to the conclusion that expropriation was permitted only of land and waters and not of personal property such as leases and concessions; and so the oil companies contended. The court, however, supports the right to expropriate personal property by reason of another part of Article 27, namely Fraction VI, which provides:

The Federal and State laws shall determine, within the respective jurisdictions, those cases in which the occupation of private property shall be considered of public benefit; and, in accordance with said laws, the administrative authorities shall make the corresponding declaration.

In at least one previous decision of the court (*Castellanos Vda. Zapata*, December 8, 1936), it was held that the Constituent Assembly, or constitutional convention, had intended, by the part of Article 27 first above quoted, to establish a régime for land and waters and, by the second, to subject property of all kinds to expropriation or occupation in the public interest. Ordinarily one would have been inclined to apply the rule of interpretation: *expressio unius est exclusio alterius*. However, the court expressly denies that a nexus exists between these two grants of power. The view of the court on this branch of the case may be best summed up by its statement that: "The justification for the taking of private property rests in the public benefit which requires it and not in the eminent domain which the Nation retains over lands and waters."

Perhaps the most significant part of the decision is the interpretation given to the part of the Constitution already referred to which permits the legislature to determine the cases in which the taking of private property shall be deemed to be of public benefit. The oil companies had contended that the thing expropriated must be of benefit to or be utilized for the collective interest in general, and not for one social class to the exclusion of others; that the Expropriation Law itself enumerates causes not of public benefit but for the limited benefit of workers in a certain industry and is, therefore, unconstitutional. The court brushes this contention aside, declaring that

"public benefit" has only as its antithesis "private benefit," and the legislature is fully empowered to determine what is in the public interest without the interposition of judicial authority. The drastic character of this phase of the decision is emphasized by the fact that the expropriatory decree followed close upon a declaration by the oil companies that they were unable to comply with the terms of an award of the Mexican Labor Board, increasing wages and giving the workers certain rights in the management of the companies. It was asserted that the Mexican President had explained the action taken by him to be based upon the "rebellious attitude" of the companies in this respect, and accordingly the expropriations were really in the nature of a penalty. The court found this claim not sustained by the facts in the record. In any event, this becomes a minor question if the legislature has the sole power to determine what is for the public benefit, because if the judicial process is excluded, questions of motive or inducement become immaterial for all practical purposes.

Much of the decision is taken up with a discussion of principles applicable in determining the amount of compensation. The court refers at great length to decisions of United States courts dealing with the proper method for the valuation of franchises in expropriation and rate-making cases. Decisions of our Federal and State courts are cited to show that the ownership which the surface owner possesses in oil and gas below the surface is not absolute. The peculiar analogy to *ferae naturae* is approved and adopted.

We do not here assume to discuss the decision from the point of view of its relevancy in the presentation of an international claim. From the point of view of international law, the decision has the merit of finality and comprehensiveness. The fact that its interpretation of the Mexican Constitution frankly leans to the side of enhanced power in those organs of the state which wield political authority, is not surprising. The same tendency is manifest elsewhere and, indeed, has penetrated our own judicature in recent years. However, when foreign interests are involved, the recognition by a court of last resort of the unlimited power of the legislature to take private property and the surrender of its own judicial control constitute the very basis upon which an international claim is often predicated. In the present case, there is also the diplomatic record to be considered.

A discussion of the bases of international adjustment will probably have to include a consideration of the Warren-Payne agreement of 1923 and the Calles-Morrow agreement of 1927. The Mexican Government recognizes, and has recognized from the beginning, the obligation to compensate, not only by the terms of the law itself, but also in its subsequent declarations both before and after the decision of the court. The admitted financial position of the government, however, makes the manner by which compensation is to be effected of vital importance. The ability to compensate is perhaps of greater importance than the willingness to compensate. However, direct negotiations with the companies are reported to be progressing

satisfactorily.² It will be fortunate if the repercussions of the decision lead to a better *modus vivendi* by which the development of natural resources in the Americas by the aid of foreign capital may be made possible. If the phrase: "economic solidarity of the Americas," now so often employed, is to have any real meaning for the future, a satisfactory solution must be found by which exploitation at the expense of the vital interests of the local state may be prevented, while at the same time security is provided against spoliation, after foreign capital has assumed the necessary risks, often at the express invitation of the local state.

ARTHUR K. KUHN

THE "CARDENAS DOCTRINE"

Dr. Salvador Mendoza, a distinguished Mexican lawyer, in an address before the "Socialist Lawyers Front" of Mexico on October 27, 1938, stated: "So far as I know, there does not exist in the literature of international law a formula that embraces in such strong and precise language as expressed by President Cardenas the principle of the abolition of the extritoriality of nationality." He also adds that "this doctrine comes at a moment when almost all the classic values of international law are suffering a serious collapse."

A special commission of lawyers composed of Drs. Juan Manuel Alvarez del Castillo, Francisco Arellano Belloc, and Luciano Castillo, has formulated the "Cardenas Doctrine" in the following terms:

Nationality, as personal status, has full juridical effect only within local jurisdiction. It lacks extritoriality, and its effects are therefore suspended in every instance when a moral and physical person moves to foreign soil to develop investments, commercial undertakings, or for pecuniary gain, or for the purpose of establishing oneself in the midst of a hospitable state, which, as a consequence, should afford every facility and guarantees to those who immigrate lawfully to its territory with these intentions, in order that they may acquire the status of nationality on terms of civil equality respecting the rights and obligations of its own citizens.

The original statement of this "doctrine" by President Cardenas was made in the course of an address before the International Congress against War held in Mexico City on September 10, 1938. Freely translated, it reads as follows:

I refer to the international theory which affirms the persistence of nationality in those who emigrate to countries other than their own in search of better living conditions and economic prosperity. And this theory which at first glance seems to emanate from a principle of natural right, and to be in harmony with the political understandings which up till now have controlled the life of nations, is only one of the fundamental injustices that originate in the idea of the clan, or so to speak, in the

² See New York Times, March 6, 1940, p. 7.

assertion of the persistence of the tribe and nationality across the frontiers of space and time, thus creating by this misconception a series of antecedents which have been lamentable for the independence and sovereignty of peoples.

What are the obligations and rights represented by every foreigner in the country in which he lives, in which he tries out his fortunes, his talents and industry, in which he has his family and home, and in which, finally, his heirs grow up and better their economic state? In the light of every sound doctrine, every individual who cuts loose from his country to find in another what is lacking in his own, has the inescapable duty of accepting all the conditions, favorable or adverse, of the milieu which receives him. We should add as a compensating consideration, he should enjoy all the prerogatives of the useful and respectable citizen of the society in which he resides.

From this it is to be deduced that the restrictions of citizenship as well as the persistence of nationality imposed by the country of his origin engender the embarrassments rooted in the absurd theory of foreign status with all its evil consequences. . . .

. . . Peoples who are not prepared receive them as foreigners, treat them as such with a consideration that exceeds respect and borders on fear, resulting in the taking into consideration of their uncertain laws and surrounding the property they acquire with the fiction of exterritoriality. The governments of their origin, for their part, urge them on and protect them as an outpost of an unforeseen conquest and as the first stage in the achievement of the extension of their boundaries and sovereignty.

The significance of this revolutionary "doctrine" is all too plain. It is true, as Dr. Mendoza points out, that "the classic values of international law are suffering a serious collapse," but this "doctrine," if it were ever accepted by a considerable number of nations, would result in the total extinction of the law of nations. If foreigners engaged in normal international trade and intercourse should automatically lose their nationality and citizenship on crossing the borders of another nation; should be deprived of the fruits of their labor and thrift; should be denied all diplomatic assistance, and become subject to the vagaries of local jurisdiction, without the right of appeal to universal standards of right and justice, then certainly there would be no reason for a law of nations. Each sovereign nation would be supreme, subject to no superior considerations or restraints. This, of course, could only result in international anarchy, a return to the barbarism of warring tribes in the heart of Africa. This, indeed, would be the very exaltation of the "absurd theory" of the tribe and clan to which the "Cardenas Doctrine" is so violently opposed.

It is clear that President Cardenas, in his plea for the abolition of the "exterritoriality of nationality," was seeking to justify the policy of the confiscation of the property of foreigners so ruthlessly applied by the Mexican Government in recent times. This policy was unanimously sustained by the Supreme Court of Mexico in its decision of March 1, 1938, and justified in an amazing speech by Justice Icaza on that occasion, when he boldly said:

I have already done my part. I have intervened continuously, firmly and passionately. . . . It is not a conflict of a legal character but of a political character. . . . I am satisfied with the manner in which I have behaved. I am even proud of it. . . . And once the small South American nations see what is happening in Mexico they will do the same.

The "Cardenas Doctrine," in its practical application in Mexico, is clearly a "political" matter, not a legal one. It is a policy based, not on accepted principles of international intercourse, but on a socialistic philosophy which closely approximates that of the Russian Soviet Union. When President Cardenas demanded the abolition of the "extritoriality of nationality" he was addressing a congress of workingmen. The whole address was a rather typical socialistic diatribe, a sweeping denunciation of the whole capitalistic system in its diverse manifestations, notably in predatory imperialism, in abuses of the Monroe Doctrine, in economic and diplomatic intrigues and aggressions. It was in no sense the clear deliberate enunciation of a legal doctrine in the form of a diplomatic document, or a statesman-like declaration based on closely reasoned arguments. It was nothing else than a political declaration which admirers have since tried to immortalize as the "Cardenas Doctrine." As such it should not properly be given serious consideration. If, however, this "doctrine" should be formally accepted by other South American nations, as suggested by Justice Icaza, it would result in a general attack on the rights of foreigners. It would mean the triumph of the Stalin idea of international society over the ideals of Grotius.

PHILIP MARSHALL BROWN

THE POWER TO DECLARE NEUTRALITY UNDER AMERICAN LAW

The Neutrality Act of November 4, 1939,¹ differs from previous neutrality acts of the United States in giving Congress, as well as the President, power to recognize foreign war and to declare American neutrality.² This novelty emphasizes the political, as distinct from purely factual, character of such recognition, and raises a constitutional problem with respect to the sphere of legislative and executive powers.

Several Acts since 1794 have vested the President with discretion to decide whether embargoes should or should not be applied during foreign war or insurrection.³ The Act of February 29, 1936, for the first time made the

¹ See this JOURNAL, Supp., Vol. 34 (Jan., 1940), p. 44.

² The recognition of a foreign war by the United States is here treated as identical with the recognition of American neutrality in respect to that war, i.e., if it is "war" and the United States does not wish to become a belligerent, it must be "neutral." If, on the other hand, the United States does not want to be neutral, foreign hostilities may be recognized as insurgency, aggression, intervention, reprisals, or something other than "war." This development of numerous classes of hostilities different from "a state of war" has added to the degree of political discretion involved in such recognitions.

³ See Act of June 4, 1794 (Deák and Jessup, A Collection of Neutrality Laws, Regulations

existence of foreign war itself, so far as the United States is concerned, explicitly contingent upon a "finding" by the President,⁴ thus suggesting that considerations of policy as well as appreciations of fact are involved. This position is emphasized by the Act of 1939 which confers power to make such a finding alternatively upon the Congress.

The earliest American Neutrality Act, that of June 5, 1794,⁵ made no reference to presidential findings that foreign war existed nor to proclamations of neutrality, but merely defined certain acts of "American citizens" or "persons" within the territory of the United States which would be punished if intended to serve a foreign prince or state "in war"; "as a soldier, marine or seaman"; "by committing hostilities upon the subjects, citizens or property of another foreign prince or state with whom the United States are at peace"; "at war with another foreign prince or state with whom the United States are at peace"; or if connected with a military expedition from the United States "against the territory or dominions of any foreign prince or state with whom the United States are at peace." This Act was amended in 1818,⁶ adding the words "colony, district or people" after the words "foreign prince or state" in each instance, thus making it more clearly applicable to cases of foreign insurrection.⁷ So far as the phraseology is concerned, it might be supposed that courts and administrative officers applying this legislation would be free to use suitable evidence, themselves to determine, whether these conditions of foreign war or hostilities existed in fact.⁸

But while the Congress treated the existence of war or hostilities as a fact, the executive early recognized that there were elements of policy involved. The question of proclaiming neutrality was debated in Washington's Cabinet in 1793,⁹ and the proclamation which was finally issued¹⁰ (carefully avoiding,

and Treaties of Various Countries (Washington, 1939), Vol. 2, p. 1118); Joint Resolution, March 14, 1912 (*ibid.*, p. 1089); Jan. 31, 1922 (*ibid.*, p. 1095); May 28, 1934 (*ibid.*, p. 1143).

⁴ This amended the Act of August 31, 1935. See notes 18, 19, *infra*.

⁵ Deák and Jessup, *op. cit.*, Vol. 2, p. 1079.

⁶ *Ibid.*, p. 1085. With minor modifications, this Act was incorporated in the Revised Statutes of 1874 (Secs. 5281-5291), in the Criminal Code of 1909 (Secs. 9-18), and in the U. S. Code of 1934 (Tit. 18, Secs. 21-30).

⁷ *The Three Friends*, 166 U. S. 1 (1897). It was interpreted to apply only to service in behalf of insurgents against a recognized government, not to service in behalf of a recognized government against insurgents, although literally the text applies both ways. *The Carondelet*, 37 Fed. 799; *The Conserva*, 38 Fed. 431; Hoar, Atty. Gen., 1869, 13 Op. 177; Moore, *Int. Law Digest*, Vol. 7, pp. 904, 1076, 1079; C. G. Fenwick, *The Neutrality Laws of the United States* (1913), p. 75.

⁸ This might also be supposed from the early assumption that the courts could exercise a common law jurisdiction to punish offenses against neutrality (*In re Henfield*, Fed. Cas. 6360 (1793); Q. Wright, *Enforcement of International Law through Municipal Law* (1916), p. 115), and from the explicit grants of jurisdiction to the courts by the Act (Arts. 6, 7).

⁹ Moore, *op. cit.*, Vol. 5, p. 589.

¹⁰ *Ibid.*, Vol. 7, p. 1002; Deák and Jessup, *op. cit.*, Vol. 2, p. 1172. This begins: "Whereas it appears that a state of war exists between . . . and the duty and interest of the United

on Jefferson's insistence, the use of the word "neutrality")¹¹ aroused a vigorous pamphlet debate between Madison (Helvidius) and Hamilton (Pacificus).¹² The former asserted that the power to declare neutrality was vested in the Congress and not in the President. In fact, Hamilton's view, insisting that this power belonged to the President, has prevailed, and the President has upon many occasions recognized foreign hostilities which might involve the application of the Act of 1794 and its amendments.¹³ These hostilities, however, have been more frequently insurrections or domestic violence in the vicinity of the United States than states of war. In fact, the President has not made general proclamations of the latter, unless it seemed likely that there would be an occasion for application of the American laws. Thus, there seems to have been no proclamation in regard to the Crimean War of 1854, the Russo-Turkish War of 1878, or the Balkan Wars. Proclamations were, however, issued in regard to the Franco-Prussian War, the Russo-Japanese War, the Tripolitan War and the World War, as well as in regard to insurrections in the Spanish dominions adjacent to the United States, in Canada, in Cuba, in Mexico and in Central America.¹⁴

Courts in practice have declined to consider that the existence of circumstances calling for the application of this Act are merely a question of fact, but have treated the recognition of foreign hostilities, like the recognition of foreign states and governments, as a "political question" in regard to which they must follow the political organs of the government. They have not admitted all evidence to determine whether foreign war exists but, in the absence of specific legislation assuming the existence of particular hostilities, have turned exclusively to presidential proclamations.¹⁵ Their attitude has been that if the President does not so recognize it, it is not a war for the

States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers. . . ."

¹¹ Jefferson to Monroe, July 14, 1793, Moore, *op. cit.*, Vol. 7, p. 1004.

¹² *Ibid.*; E. S. Corwin, *The President's Control of Foreign Relations* (Princeton, 1917), p. 7 ff.

¹³ "In every case of a new government and of belligerency, the question of recognition was determined solely by the executive." In some cases of recognizing new states, especially where recognition might be premature and involve serious political consequences for the United States, the President has "invoked the judgment and coöperation of Congress." Moore, *op. cit.*, Vol. 1, pp. 243-244. See also, Q. Wright, *The Control of American Foreign Relations* (New York, 1922), pp. 268, 271.

¹⁴ For texts, see Deák and Jessup, *op. cit.*, Vol. 2, pp. 1172-1207. There have been many proclamations applying special legislation, especially in Mexico, the Caribbean and the Far East. *Ibid.*, pp. 1208, 1232.

¹⁵ J. B. Moore writes: "Where the armed conflict is between independent nations, no embarrassment arises, since the parties, wherever the existence of a state of war is duly established, immediately become entitled to the rights of belligerents. But in the case of insurrection or revolt, the question is less simple." (*Op. cit.*, Vol. 1, p. 164.) But there has been much "embarrassment" in recent years to determine, even in case of hostilities between independent nations, whether "the existence of a state of war is duly established."

courts. They have taken a somewhat broader view in regard to insurrections and other hostilities short of war, but even in such cases they have relied primarily upon presidential acts and utterances.¹⁶

The Acts of 1915, 1916 and 1917, applying the legislation of 1794 and 1818 to new circumstances developed during the World War, gave the President certain powers, "during the existence of a war to which the United States is not a party," or "in which the United States is not engaged," or "in which the United States is a neutral nation."¹⁷

The Act of August 31, 1935, declared "that upon the outbreak and during the progress of war between or among two or more foreign states the President shall proclaim such fact," after which certain acts of individuals will become unlawful.¹⁸ This emphasized the factual character of war, suggesting that the President's proclamation is mandatory and ministerial.

The Act of February 29, 1936, however, changed this to read "whenever the President shall find that there exists a state of war between or among two or more foreign states." This suggests that the "finding" involves political discretion, though this suggestion is somewhat modified by the following phrase, "the President shall proclaim such fact."¹⁹

This latter qualification is eliminated in the Act of 1939 which reads:

Whenever the President, or the Congress by concurrent resolution, shall find that there exists a state of war between foreign states, and that it is necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States, the President shall issue a proclamation naming the states involved; and he shall, from time to time, by proclamation, name other states as and when they may become involved in the war.²⁰

This seems to recognize that a finding of the "existence of a state of war," as well as a finding that it is necessary to apply the Act after such a state of war has been found to exist, involves political discretion, but the next paragraph suggests, somewhat inconsistently, that the "ceasing to exist" of war is a purely factual determination.²¹ It reads:

Whenever the state of war which shall have caused the President to issue any proclamation under the authority of this section shall have ceased to exist with respect to any state named in such proclamation, he shall revoke such proclamation with respect to such state.

¹⁶ *Gelston v. Hoyt*, 3 Wheat. 246 (1818); *The Three Friends*, *supra*; Moore, *op. cit.*, Vol. 1, p. 247, Vol. 7, p. 1078; Wright, *op. cit.*, pp. 172-173. The President might, of course, inform the courts of the existence of a war or hostilities in a particular case without general proclamation (see Moore, *op. cit.*, Vol. 7, p. 1019). Before 1818 the enforcement of neutrality was left mainly to the State governors. *Ibid.*

¹⁷ Deak and Jessup, *op. cit.*, Vol. 2, pp. 1089, 1090, 1092.

¹⁸ *Ibid.*, p. 1100.

¹⁹ *Ibid.*, p. 1105.

²⁰ *Supra*, note 1.

²¹ The determination of when a war has terminated, has sometimes been a more difficult political problem than the determination of when it has begun. Q. Wright, *op. cit.*, pp. 290-293; *The Protector*, 12 Wall. 700 (1871); Moore, *op. cit.*, Vol. 7, p. 337.

There has been much discussion as to whether the existence of a state of war under international law depends upon the fact of large-scale hostilities, upon the manifestation of an *animus belligerendi* by some state, or upon general recognition by the states of the world.²² The phraseology of the most recent American Act appears to lend weight to the latter hypothesis, as does the practice of the United States in declining to find that a state of war either exists in China or existed recently in Finland.

Can the Congress be authorized to find that a state of war exists by "concurrent resolution"? Congress can by a "joint resolution" declare a state of war for the United States,²³ and it has been asserted that by this method it could recognize a state of war as existing between foreign countries,²⁴ although it appears never to have done so.²⁵ The numerous embargo, non-intercourse and reprisal Acts passed during the French Revolutionary and Napoleonic periods did not assert that a state of foreign war existed, but merely enacted certain measures to be applied for defined periods of time,

²² Q. Wright, "When Does War Exist," this JOURNAL, Vol. 26 (1932), p. 362 ff.; "The Meaning of the Pact of Paris," *ibid.*, Vol. 27 (1933), p. 57 ff.; comments, Proc. Am. Soc. Int. Law, 1938, pp. 122, 146, 150, 191; "The Existing Legal Situation as It Relates to the Conflict in the Far East," Institute of Pacific Relations, 1939, p. 93; A. D. MacNair, "The Legal Meaning of War," Transactions of the Grotius Society (London), 1925; Clyde Eagleton, "The Attempt to Define War," International Conciliation, Nov., 1933, No. 291; J. L. Brierly, "International Law and Resort to Armed Force," Cambridge Law Journal, Vol. 4 (1932), p. 308 ff.; Philip C. Jessup, "The Birth, Death, and Reincarnation of Neutrality," this JOURNAL, Vol. 28 (1932), p. 789 ff.; E. M. Borchard, "War and Peace," *ibid.*, Vol. 27 (1933), p. 114 ff.; Sir John Fischer Williams, "The Covenant and War," Cambridge Law Journal, Vol. 5 (1933), p. 1 ff., reprinted in Some Aspects of the Covenant of the League of Nations (Oxford, 1934), p. 292 ff.; H. Lauterpacht, "Resort to War," this JOURNAL, Vol. 28 (1934), p. 43 ff.; H. W. Briggs, The Law of Nations, Cases, Documents, and Notes (New York, 1938), pp. 718-725; G. G. Wilson, "War Declared and the Use of Force," Proc. Am. Soc. Int. Law, 1938, p. 106 ff.; comments of A. E. Hindmarsh, F. E. Dunn, J. L. Kuna, L. H. Woolsey, *et al.*, *ibid.*, pp. 119 ff., 140 ff.; W. W. Willoughby, The Sino-Japanese Controversy and the League of Nations (Baltimore, 1935), p. 541 ff. It seems that a "resort to war" in the sense of Art. 16 of the League of Nations Covenant does not imply that a "state of war" exists; in fact it implies the contrary, for under Art. 16 the members of the League cannot be neutral, as they would be if a "state of war" existed. Failure to distinguish the use of the word "war" in the material and in the legal sense has often caused confusion (The Prize Cases, Nelson, J., dissenting, 2 Black 635 (1863); *The Three Friends*, *supra*; Wright, "Changes in the Conception of War," this JOURNAL, Vol. 18 (1924), p. 761), a confusion which has not always been absent from the organs of the League of Nations in applying Art. 16. (See report of the Council Committee on the applicability of Art. 16 in the Italo-Ethiopian hostilities, Oct. 7, 1935, Minutes, 7th meeting, 89th sess. of Council; Q. Wright (ed.), Neutrality and Collective Security (Chicago, 1936), p. 203; "The Test of Aggression in the Italo-Ethiopian War," this JOURNAL, Vol. 30 (1936), p. 50.)

²³ Constitution, Art. 1, Sec. 8, cl. 11. Such a declaration constitutes a resolution which, under Art. 1, Sec. 7, cl. 3, is subject to the President's veto.

²⁴ In the Helvidius letters Madison deduced the power of Congress to declare neutrality from its power to declare war because, he argued, a decision with respect to neutrality involved a judgment on the expediency or duty to declare war. (Corwin, *op. cit.*, p. 21.)

²⁵ *Supra*, note 13.

or in some cases against particular states.²⁶ The resolution of May 28, 1934, applied "to those countries now engaged in armed conflict in the Chaco."²⁷ The resolution of January 8, 1937, applied "during the existence of the state of civil strife now obtaining in Spain."²⁸ These appear to have been recognitions of conditions of armed hostility but not of "states of war."

But whatever may be the powers of Congress by joint resolution submitted to the President, it is very difficult to find any constitutional authority for exercising such a power by "concurrent resolution." A concurrent resolution means a resolution agreed to by a majority of both houses of Congress but not submitted to the President. Such resolutions have been used from early time in matters of no legislative effect, such as addresses of condolence or congratulation, or agreements for the procedure of joint committees of the two houses.²⁹ The Constitution seems to be unequivocal that a congressional resolution can have no legal effect unless approved by the President or passed over his veto. It provides:

Every order, resolution or vote to which the concurrence of the Senate and the House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.³⁰

The only exception has been in the case of resolutions passed by two-thirds of the House and Senate proposing amendments to the Constitution as provided in Article V. These need not be submitted to the President, but, as they require a two-thirds' vote in each house, they could in any case pass over the President's veto.³¹

The issue was raised in connection with a proposed reservation to the Treaty of Versailles authorizing American withdrawal from the League of Nations by "concurrent resolution."³² Although the proposal was accepted

²⁶ See Deak and Jessup, *op. cit.*, Vol. 2, pp. 1116 ff., 1114 ff.

²⁷ *Ibid.*, p. 1143.

²⁸ *Ibid.*

²⁹ A report of the Senate Committee on the Judiciary (54th Cong., 2d Sess., Sen. Rep. 335) stated: "The committee found that the passage of concurrent resolutions began immediately upon the organization of the Government, but their use has been not for the purpose of enacting legislation, but to express the sense of Congress upon a given subject—to adjourn longer than three days, to make, amend, or suspend joint rules, and to accomplish similar purposes, in which both houses have a common interest but with which the President has no concern." (4 Hinds, Precedents, 3483). See also *ibid.*, Vol. 2, pp. 1566, 1567; Willoughby, *The Constitutional Law of the United States* (1910), Vol. 1, p. 568; Cong. Rec., Nov. 7, 1919, Vol. 58, Pt. 8, p. 8075.

³⁰ Art. 1, Sec. 7, cl. 3.

³¹ Hinds, *op. cit.*, Vol. 5, p. 7027; *Hollingsworth v. Virginia*, 3 Dall. 378 (1798); Willoughby, *op. cit.*, Vol. 1, p. 529.

³² Senator Lodge said he supported that reservation because he did not want "to see us left where the President . . . can practically veto our retirement from the league." Cong. Rec., Nov. 8, 1919, Vol. 58, Pt. 8, p. 8136. See Q. Wright, "Validity of the Proposed Reser-

by a majority of the Senate, several Senators expressed the view that it was unconstitutional,³³ and President Wilson wrote in a letter to Senator Hitchcock, "I doubt whether the President can be deprived of his veto power under the Constitution even with his own consent."³⁴ Clearly, neither a treaty nor an Act of Congress can amend the Constitution, and an alteration of the procedure provided in the Constitution for making any "order, resolution or vote" effective, would be such an amendment.

It was suggested, however, in the Versailles Treaty debate that "any certain event" (such as the passage of a "concurrent resolution") could have attributed to it by a treaty (or presumably by an Act of Congress) an influence in terminating (or presumably in initiating) the application of a law.³⁵ To this Senator Walsh of Montana replied:

A statute or a treaty might end upon the occurrence of a fortuitous event or upon the determination of a certain fact or of a certain condition by a certain officer, he having no discretion on the subject at all; but when it becomes a question of the exercise of his judgment or his discretion about whether the law should remain in force or whether it should be repealed, considering the good of the country, that would be an unlawful delegation of legislative power.³⁶

Inasmuch as the finding that a state of war exists involves political discretion, it seems clear that power cannot be delegated to Congress to make this finding by concurrent resolution. Such a resolution, if passed by Congress, would have to be considered simply advisory and the President would be within his constitutional powers in ignoring it.

In view of the established intent of the Constitution to vest initiative in international affairs in the President,³⁷ and the President's position as the

variations to the Peace Treaty," *Columbia Law Review*, Vol. 20 (Feb., 1920), p. 127 ff.; *Control of American Foreign Relations*, p. 107 ff.

³³ Senators Williams (Miss.), Robinson (Ark.), Walsh (Mont.). *Cong. Rec.*, Nov. 7, 8, 1919, Vol. 58, Pt. 8, pp. 8079, 8124, 8130.

³⁴ Letter to Senator Hitchcock, Jan. 26, 1920.

³⁵ Senator Lenroot (Wis.), *Cong. Rec.*, Nov. 7, 1919, Vol. 58, Pt. 8, p. 8076. See also remarks by Senator Thomas (Colo.), and colloquy of Senator Thomas with Senator Fall (N. Mex.) and Senator Gore (Okla.), *ibid.*, Nov. 8, 1919, p. 8122.

³⁶ *Ibid.*, pp. 8130-8131. This is merely an application of the familiar distinction between delegation of legislative and of fact-finding power. "The Legislature can not delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which a law makes, or intends to make, its own action depend." (Harlan, J., in *Field v. Clark*, 143 U. S. 649 (1892), quoting *Lockes Appeal*, 72 Pa. St. 491 (1873).) See also Willoughby, *op. cit.*, Vol. 2, p. 1319.

³⁷ "Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." (*United States v. Curtiss-Wright Export*

sole source of official communication with foreign governments,³⁸ it may be doubted whether even a joint resolution, passed by two-thirds vote in both houses over the President's veto, could recognize the existence of foreign war and declare neutrality.³⁹

As has been noted, Congress has been extremely hesitant to claim a competence with respect to recognition in the past.⁴⁰ The Presidents and Secretaries of State have held consistently that recognition is exclusively an executive function.⁴¹

While the tendency for recognition to become less a finding of fact and more a determination of policy has increased the anxiety of Congress to exercise some control, this tendency has not altered the conditions with respect to information of foreign governments and capacity to communicate with them and to decide promptly, which have favored the President's claim.⁴²

The President has on occasion complained of congressional encroachments upon his constitutional powers in foreign affairs,⁴³ but in times of emergency

Corp., 299 U. S. 304 (1936), this JOURNAL, Vol. 31 (1937), p. 338.) See also, Sutherland, *Constitutional Power and World Affairs* (New York, 1919). "Resolutions expressing general policies or principles on most subjects connected with foreign relations may be constitutionally passed by Congress, and may furnish useful guides to the President. Congressional expressions of opinion on particular issues, however, and attempts to direct the President thereon encroach upon the executive field and may embarrass the President's action. In practice foreign policy has developed by executive precedent, practice and declaration." (Q. Wright, *The Control of American Foreign Relations*, p. 282.)

³⁸ "The President is the sole organ of the nation in its external relations and its sole representative with foreign nations." (John Marshall, in House of Representatives, Annals, 6th Cong., Col. 613.) "The President is the constitutional representative of the United States with regard to foreign nations." (Report of Senate Committee on Foreign Relations, Feb. 15, 1816, Compilation of Reports, 1801, 56th Cong., 2d Sess., Sen. Doc. 231, Vol. 8, p. 24. See also 54th Cong., 2d Sess., Sen. Doc. 56, p. 21.) "The President is the organ of diplomatic intercourse of the Government of the United States, first, because of his powers in connection with the reception and dispatch of diplomatic agents and with treaty making; secondly, because of the tradition of executive power adherent to his office." (Corwin, *op. cit.*, p. 33.) Other materials to similar effect are cited in Q. Wright, *op. cit.*, p. 21 ff.

³⁹ "Instead of admitting the Senate or House of Representatives to any share in the act of recognition, I would expressly avoid that form of doing it which would require the concurrence of those bodies. It was, I had no doubt, by our Constitution, an act of the Executive authority." (John Quincy Adams, Sec. of State, Jan. 1, 1819, Moore, *op. cit.*, Vol. 1, p. 244.) "In the department of international law, therefore, properly speaking a Congressional recognition of belligerency or independence would be a nullity." (Report of Senate Committee on Foreign Relations, 1897, Sen. Doc. 56, 54th Cong., 2d Sess., p. 22.)

⁴⁰ *Supra*, notes 25-28, 38, 39. Henry Clay's attempt to effect recognition of the "Independent Provinces of the River Plata in South America" by Congressional resolution in 1818 failed. Corwin, *op. cit.*, p. 76; Q. Wright, *op. cit.*, p. 271; Moore, *op. cit.*, Vol. 1, p. 82.

⁴¹ *Supra*, notes 13, 39.

⁴² Q. Wright, *op. cit.*, pp. 363-365.

⁴³ President Grant vetoed two resolutions directing appreciative messages to two foreign governments because they "inadvertently infringed upon the constitutional rights of the Executive." (Richardson, *Messages*, Vol. 7, p. 431.) See also, Jefferson, Sec. of State, to Genet, French Minister (Moore, *op. cit.*, Vol. 4, p. 680); Bryan, Sec. of State, to Gerard,

Congress has usually recognized presidential authority in this field.⁴⁴

Under the Articles of Confederation Congress attempted to deal with foreign affairs directly, with results which approached disaster.⁴⁵ One reason for making the Constitution was to provide concentrated authority for dealing with international affairs.⁴⁶ Until these affairs are reduced to orderly and democratic processes of adjudication, negotiation and consultation, it would appear that the constitutional practice should be observed of leaving their conduct primarily with the President, who alone can act with the information, decision and dispatch essential in a world as yet unorganized for peace and unsafe for democracy.⁴⁷

QUINCY WRIGHT

VAE VICTIS

Following its precedent at the time of the invasion of Belgium, the German Government has issued a fiat which has the effect of terminating the mission of all foreign representatives in Poland. This leaves several hundred resident American citizens without the protection of their lawfully established consular representatives in the Polish State. As was to be expected, the Department of State protested, and released under date of March 20 the following statement:

The German Government decided some time ago to evacuate the members of the diplomatic and consular establishments of all foreign governments in occupied Poland. The German Government fixed the twentieth of this month as the date of their departure. In this connection, the members of the American Consulate General in Warsaw were requested to leave Poland. The Department understands they are leaving today for Berlin where they will report to the American Embassy.

Representations were made to the German Government through the

American Ambassador in Germany, May 13, 1915 (White Book, European War, No. 1, p. 76); Q. Wright, *op. cit.*, pp. 22-23, 278-279.

⁴⁴ Q. Wright, *op. cit.*, pp. 265-368, *Am. Pol. Sci. Rev.*, February, 1921; *Survey of American Foreign Relations*, 1928, C. P. Howland (ed.), pp. 95-105.

⁴⁵ Q. Wright, *Domestic Control of Foreign Relations*; *Survey of Am. For. Rel.*, 1928, C. P. Howland (ed.), pp. 92-95; Royden Dangerfield, *In Defense of the Senate* (Norman, Okla., 1933), pp. 11-17.

⁴⁶ See remarks by Hamilton and Gouverneur Morris, Farrand, *Records of the Federal Convention*, Vol. 1, pp. 290, 513; *The Federalist* (Ford ed.), Nos. 64 (Jay), and 70 (Hamilton), pp. 429-430, 467.

⁴⁷ To DeTocqueville's comment (*Democracy in America* (New York, 1862), Vol. 1, p. 254) that "it is most especially in the conduct of foreign relations that democratic governments are decidedly inferior to governments carried on upon different principles," Elihu Root replied, "It is because democracies are not fitted to conduct foreign affairs as they were conducted in DeTocqueville's day," and one now has to add in our own day also, "that the prevalence of democracy throughout the world makes inevitable a change in the conduct of foreign affairs," if, one must add today, democracy is to survive. (*Proc. Am. Soc. Int. Law*, 1917, p. 9.)

American Embassy in Berlin stressing the difficulty of rendering assistance and protection to American citizens without consular representation in Warsaw. The German Government, however, took the position that all foreign diplomatic and consular officers must withdraw. Consequently, all matters in connection with American citizens now in Poland will be handled for the present through the American Embassy in Berlin. In the meantime, this Government has reserved all of its rights in the matter.

Secretary Hull is to be commended in that he did not follow the precedent of Secretary Bryan, who acquiesced when the German Government declared that the exequaturs of our consuls in the occupied portions of Belgium had "expired." The Belgian Government lodged a vigorous protest against the claim of the German Government to cancel consular exequaturs. Excepting certain specified regions, the German Government offered to grant "temporary recognition" to enable consular officers "to act in their official capacity under reserve of the usual investigations respecting their records."¹ Under that plan it was still possible for consular representatives acceptable to the occupying Power to protect Americans in Belgium. In the note which Secretary Bryan on January 21, 1915, instructed Ambassador Gerard to present to the German Government he said:

The Government of the United States, in view of the fact that consular offices are commercial and not political representatives of a government and that permission for them to act within defined districts is dependent upon the authority which is in actual control of such districts irrespective of the question of legal right, and further, in view of the fact that the consular districts, to which reference is made in the note verbale of the Imperial Government, are within the territory now under German military occupation, is not inclined at this time to question the right of the Imperial Government to suspend the exequaturs of the consular officers of the United States within the districts which are occupied by the military forces of the German Empire and subject to its military jurisdiction.²

Although this statement contains some of the customary qualifications and escape phrases beloved of diplomacy, it would seem that Secretary Bryan need not have gone quite so far in accepting without more formal protest or reservation the claim to effect a general revocation of the consular exequaturs by an occupying Power. Our Government could not, of course, in Poland, which we regard as territory under military occupation, oppose any direct resistance to the orders issued by the occupying Power unless we were ready to choose the path of war. It is true that we might justifiably by way of reprisal have withdrawn the exequaturs of an equal number of German representatives in this country, but the American people are not, at present, prepared to engage in a proceeding so likely to embitter our relations.

The situation is already made delicate by our adherence to the Stimson

¹ This JOURNAL, Special Supplement, Vol. 10 (1916), pp. 445-446.

² *Ibid.*, p. 449.

Doctrine in accordance with which we decline to recognize the fruits of conquest. Although there is at present *de facto* no territorial *situs* for Poland as an independent state, we continue to recognize Count Potocki as the Ambassador of Poland, which still exists *de jure*, German and Russian lawless conquest to the contrary notwithstanding. By this action we intervene in a negative manner in defense of international law and in opposition to conquest. That is a gauntlet thrown down to Germany and Russia if they choose to lift it.

It is evident that the German Government does not desire to have any official observers of the treatment of the inhabitants of its conquered territories. Consequently our citizens in Poland must for the time being depend upon such remote control protection as can be exercised by our representatives in Berlin.

ELLERY C. STOWELL

THE DIVERSION OF MERCHANTMEN

The term diversion or deviation as applied to merchantmen in time of war is used to describe the belligerent practice of requiring a neutral merchant vessel to abandon her course and to put into a belligerent port for the purpose of search. The practice and its legality have been recently discussed¹ and that discussion will not be duplicated here. Attention will be directed to recent events illustrating belligerent resort to the practice and neutral protests against it. As pointed out in the discussion to which reference has been made, the practice of diversion is unobjectionable if it means the traditional action of sending a neutral vessel into port after visit and search and capture or seizure upon the high seas. It is immaterial whether the vessel is sent in under a prize crew or under the orders and control of a belligerent warship or aircraft. Under the traditional law, the belligerent may take this step if, after visit and search, he has reasonable grounds for belief that the vessel is good prize. If the prize court determines that there was no reasonable ground for seizure, damages should be assessed against the captor. The practice of diversion without prior visit and search and on the theory that search may be conducted for the first time in port, is destructive of the neutral's right to claim damages for unjustifiable interference. The very practical question is whether the loss shall fall on the innocent neutral vessel or on the captor who has without probable cause subjected the vessel to the delay. In the case of the Claim of the Netherlands-American Steam Navigation Company,² the Court of Appeal, reversing a judgment of the British War Compensation Court, dealt with the following situation: The

¹ Harvard Research in International Law, Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, this JOURNAL, Supplement, Vol. 33 (1939), at p. 578 ff. The comment on this subject was written by the Assistant Reporter, Mr. Oliver J. Lisitzyn.

² Great Britain, War Compensation Court, 6th Report, 1926, p. 14.

Sommelsdijk was on a voyage from Buenos Aires to Helsingborg and Malmö with a cargo of maize, linseed and bran. She was detained in the Downs and at London, where her cargo was totally unloaded for purposes of "search." Ultimately the cargo was reloaded and the ship was allowed to resume her voyage. The owners claimed before the War Compensation Court for the loss of the use of the vessel from October 25 to December 6, 1915, at £500 a day. The Court of Appeal held that the action of the naval authority "amounted to a seizure which clothed the prize court with authority to entertain the claim." Since the prize court had jurisdiction, the War Compensation Court did not. Atkin, L. J., remarked: "But assuming that there must be a capture as a condition precedent to jurisdiction in prize, it appears to me that the forcible bringing in of a vessel under an armed guard for purposes of search amounts to such a capture."³ If the captor does not institute proceedings in the prize court, the claimant himself may apply for an order to release the ship and award damages.⁴

The basic question of principle in the diversion cases is whether modern conditions have altered the law governing belligerent visit and search; this question is answered in the negative for the reasons set forth in the discussion above cited. It is not possible to maintain, however, that a neutral vessel yielding to belligerent pressure and entering a control port for search may be treated by the opposing belligerent as if it had accepted belligerent convoy.⁵

During the present war, the British practice appears to be to induce or compel neutral vessels to visit a British "control" port in order that its cargo may be examined.⁶ The inducement is that the voluntary acceptance of this procedure will reduce the delay to which the vessel may otherwise be exposed. The compulsion is that if a neutral vessel fails to put in voluntarily, it will be compelled to do so if intercepted by a British warship. In effect, particularly perhaps in regard to vessels passing through the Straits of Gibraltar, the belligerent thus secures the advantages flowing from the right of blockade without being subjected to the legal requirements concerning the effectiveness of a blockade. There is a difference, however, in that an attempt to pass a British control base is apparently not an independent ground for condemnation by the prize court as it would be if the vessel were attempting to run a legal blockade. Two exceptions to the "duty" to call at a British control port seem to be established by current British practice: the first is where the neutral vessel before commencing its voyage has obtained a "navicert" from British authorities at the port where the voyage

³ *Loc. cit.*, p. 21.

⁴ See Order V, Prize Court Rules, 1914, Great Britain, Manual of Emergency Legislation (1914), p. 266.

⁵ Cf. the report in the New York Times, March 7, 1940, that the German Government has taken this position. On belligerent convoy, see the Harvard Draft, *loc. cit.*, p. 674 ff. On neutral acquiescence in illegal belligerent measures, see *ibid.*, p. 420.

⁶ See notice issued through the British Consulate General, New York, Sept. 11, 1939, CCH War Law Service, No. 65,551.

commences;⁷ the second is where the vessel gives a "Black Diamond guarantee" ⁸ that when the goods reach their neutral port of destination, they will be held until examined and passed by British officials.⁹ Although these practices are represented to be concessions for the benefit of neutral traders, they cannot be so regarded unless the underlying British views concerning the law of visit and search are accepted.

The protest of the United States Government on December 14, 1939,¹⁰ was based in part upon the fact that the British Government had reserved a right to compel the diversion into a British port of American vessels bound from the United States to northern neutral European ports. Such voyages would be legal under the Neutrality Act of 1939, since they would avoid entrance into the combat area prescribed by the President under the Act.¹¹ The forced diversion, however, would compel the vessel to enter the combat area. This was the case with the S.S. *Mormacsun*. Had the *Mormacsun* been sunk by mine or submarine in the combat area, a serious incident might have been created; the British prize courts might have awarded damages.¹² It is not apparent, however, how this provision of the domestic law of the United States affects the basic issue. The United States argued that the Neutrality Act was evidence that American vessels could not be destined for German ports, and that their cargo was "entitled to the presumption of innocent character in the absence of substantial evidence justifying a suspicion to the contrary." If an American vessel were carrying absolute contraband to a Norwegian port for transshipment by land or sea to Germany, and if she were visited, searched and captured on the high seas by the British and tried in the prize court, the United States could not object. The Neutrality Act of 1939 omitted the provision of Section 1 of the 1937 Act which limited exports "to any neutral state for transshipment to, or for the use of" a belligerent. This omission was perhaps a wise avoidance of the onerous task of determining in American ports the complex problems of

⁷ Cf. Department of State Bulletin, Vol. II, p. 5; Commerce Reports, Jan. 13, 1940, p. 25; CCH War Law Service, Nos. 40,620, 65,556, 66,005, 66,015. For a description of the navicert system during the World War, see Ritchie, *The "Navicert" System During the World War* (1938).

⁸ So called from the name of the steamship line whose vessels first utilized this procedure in the present war. There are, however, examples of similar practices in the past.

⁹ It has been stated that such officials operate, for example, in Italian ports; see *Life* magazine, Jan. 15, 1940, p. 47.

¹⁰ Department of State Bulletin, Vol. II, p. 4. See also the protest of Nov. 20, 1939, against the British Order in Council of Nov. 27, 1939, *ibid.*, Vol. I, p. 651. The text of the British Order is in CCH War Law Service, No. 65,557. See the further protest of Jan. 20, 1940, Department of State Bulletin, Vol. II, p. 94. In their protest of Dec. 27, 1939, regarding the treatment of American mails, the United States objected particularly to the "practice of taking mails from vessels which ply directly between American and neutral European ports and which through some form of duress are induced to call at designated British control bases." *Ibid.*, p. 3.

¹¹ *Ibid.*, Vol. I, pp. 50 and 69.

¹² Cf. *The Bernisse* and *The Elwe*, (1921) 1 A. C. 458.

continuous voyage, but the existing law affords the belligerent slight proof of innocent destination. The position of the United States under international law is not much strengthened in such a case by the reference to our domestic law. Had the United States rested its protest solely on the basic question of the right of diversion, it would have been on sure ground.

The Italian note of protest to the British Government as printed in the *New York Times* on March 5, 1940, adverts to the burdens imposed on neutral commerce, *inter alia* by the delays in control ports, but the general issue is not directly met. The "Italian War Law of 1938, Article 182, provides that in general the visit of a neutral ship takes place on the spot, but if conditions of sea and weather do not permit that, and if there is well-founded reason to believe that the ship is subject to capture, the warship may order the ship to a designated port to be visited."¹³

It may be suggested that unless powerful neutrals like the United States are prepared to bring pressure upon the belligerents to secure compliance with the traditional law of visit and search, the interests of neutral merchants and shipping lines would be well served by the adoption of a system of certification which would at least assure uninterrupted voyages in *bona fide* inter-neutral trade. If belligerents should decide to exercise more control over transatlantic aerial transportation, the need for the adoption of a certification system would be the more apparent.¹⁴

PHILIP C. JESSUP

INTERFERENCE WITH AMERICAN MAILS

The Government of the United States has protested, in a note delivered to the British Foreign Office,¹ against interference with the mails of the United States. The United States, it was said in this note,

readily admits the right of the British Government to censor private mails originating in or destined to the United Kingdom or private mails which normally pass *through* the United Kingdom for transmission to their final destination. It cannot admit the right of the British authorities to interfere with American mails on American or other neutral ships on the high seas nor can it admit the right of the British Government to censor mails on ships which have involuntarily entered British ports.

In support of this position, the note refers to the eleventh Hague Convention, of which Article 1 reads as follows:

The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.

¹³ Harvard Draft, *loc. cit.*, pp. 599-600.

¹⁴ Suggestions for a system of certification are elaborated in the Harvard Draft, *loc. cit.*, pp. 500-504, 506 ff. and 775 ff.

¹ Department of State Bulletin, Vol. II, No. 28, Jan. 6, 1940.

It seemed to be the purpose of those who made this convention to exempt from the interferences of maritime warfare all mail, whether public or private, whether neutral or belligerent, and on whatever ship it might be found. This exemption did not include parcel post;² nor did it exempt a neutral mail *ship* from the laws and customs of maritime war (Article 2); but even the ship could not "be searched except when absolutely necessary, and then only with as much consideration and expedition as possible." Precedent for this broad interpretation may be found in the position taken by the British Government during the American Civil War. In a note to the United States during that period it was said that

The principle which my government expects that you will admit is, that all mail bags, clearly certified to be such, shall be exempt from seizure and visitation, and that some arrangement shall be made for immediately forwarding such bags to their destination in the event of the ship which carries them being detained.³

The United States replied that in the case of capture of vessels,

The public mails of any friendly or neutral Power, duly certified or authenticated as such, shall not be searched or opened, but be put as speedily as convenient on the way to their designated destinations.⁴

The general principle of the inviolability of the mails and the necessity for their prompt dispatch was incidentally recognized by the Permanent Court of Arbitration at The Hague, in the case of *The Carthage*.⁵

The exigencies of modern warfare made themselves felt upon the mails during the World War. In a telegram from the Secretary of State, Ambassador Page, on January 4, 1916, was instructed to state that

The Department cannot admit the right of British authorities to seize neutral vessels plying directly between American and neutral European ports without touching at British ports, to bring them into port, and while there, to remove or censor mails carried by them. Modern practice generally recognizes that mails are not to be censored, confiscated, or destroyed on the high seas even when carried by belligerent mail ships. To attain same ends by bringing such mail ships within British jurisdiction for purposes of search and then subjecting them to local regulations allowing censorship of mails cannot be justified on the ground of national jurisdiction. In cases where neutral mail ships merely touch at British ports the Department believes that British authorities have no international right to remove the sealed mails or to censor them on board ship.

² See Proceedings of the Hague Peace Conferences, J. B. Scott, ed. (New York, 1920), Vol. III, p. 1106, where, in reply to a question, it was said that "postal packages are certainly excluded from the privileged treatment accorded postal correspondence." See also, Report to the Secretary of State of the Delegates of the United States to the Second Hague Conference, Foreign Relations, 1907, Pt. II, p. 1163.

³ Papers Relating to Foreign Affairs, Diplomatic Correspondence (1863), Washington, 1864, Vol. I, p. 398.

⁴ Mr. Seward to Mr. Welles, *ibid.*, p. 402.

⁵ J. B. Scott, The Hague Court Reports (New York, 1916), p. 335.

To this the Allies replied jointly on February 15, 1916, asserting that the inviolability of the eleventh Hague Convention did not affect their right to visit or seize merchandise hidden in the mail within the bag, but that they would refrain "on the high seas" from seizing genuine "correspondence."⁶ Secretary Lansing replied that these assurances were deprived of their value by the British habit of compelling neutral vessels to enter their ports and of searching the mails after the ships had thus been taken off the high seas. He cited past precedents in support of the position taken, and gave many examples of the loss suffered by Americans as the result of the Allied practice. He then wished to specify in more detail the position taken by the United States. Mail matter "which includes stocks, bonds, coupons and similar securities" is subject to the exercise of belligerent rights; likewise, "money-orders, checks, drafts, notes and other negotiable instruments which may pass as the equivalent of money" are merchandise. Correspondence, including money-order lists, shipping documents and such papers are entitled to unmolested passage, unless carried on the same ship as the property referred to. The note closed with the strong statement that the United States "can no longer tolerate the wrongs" suffered by their citizens, and was unable to submit to "a lawless practice of this character."⁷

In spite of this strong conclusion, Secretary Lansing had departed a long way from the general principle, concerning which he had quoted much past practice, that mails are inviolable. The dilemma which he encountered he revealed in a letter to President Wilson, in which he differentiated between mails going to the Central Powers, and mails coming from them or from contiguous neutral countries.⁸ As to the latter, he said, there is no basis in law or in reason for inspection of sealed or unsealed mails; but

As to the first class there exists the right to inspect unsealed mail and to detain contraband articles; but as to the inspection of sealed mail there is a conflict of principles due to the law of contraband and the theory of inviolability, principles which are irreconcilable because the superiority of right of exercise has never been determined.

This conflict is indeed irreconcilable, once it is admitted, as Secretary Lansing did admit, that some articles within the mail may be contraband and therefore subject to search and seizure. No such admission is to be found in the eleventh Hague Convention, which permitted a mail ship to be searched, but held that the mail itself was inviolable. Strictly interpreted, the words of this convention forbid opening the mails whether or not they carry contraband materials.

If, however, the principle of contraband is to be applied to the mails, it makes little difference whether they are searched upon the high seas or in

⁶ C. Savage, *Policy of the United States toward Maritime Commerce in War*, Department of State Publication No. 835 (Washington, 1936), Vol. II, pp. 433, 498-504.

⁷ *Ibid.*, p. 505.

⁸ *Ibid.*, p. 529.

port. It is not the fact that they have come into port, willingly or unwillingly, and therefore under British jurisdiction, which gives to the British Government the claim to search mails; it is the admission that mails may have a contraband character which gives the authority to search, whether upon the high seas or in port, and to seize contraband found therein. The American note of January 6, 1940, makes no admission of a right to search for contraband in the mails upon the high seas; but the British were able to reply⁹ that, as a result of the practice established during the War of 1914-1918, "the general right to search for contraband was regarded as covering a full examination of the mails for this purpose"; and, further, were able to say that the correspondence between the United States and Great Britain in 1916 "shows that at that date the United States admitted in principle the right of the British authorities to examine mail bags with a view to ascertaining whether they contained contraband." This claim seems to be borne out by the correspondence of Secretary Lansing. His last note on the subject merely reserves the right to make claims for "unjustified losses or delays."¹⁰ Some explanation for his attitude may be found in his note to President Wilson on October 17, 1916:

I think that we should bear in mind that, while we are neutral in the present war, we may be belligerent in the next and may deem it necessary to do certain things which we now regard as extreme restrictions upon neutrals. It would be unfortunate to tie ourselves too tightly to a proposition which we would regret in the future.¹¹

The position of the United States today, therefore, is reduced—unless it returns to the claim of complete inviolability under the Hague Convention—to merging complaint as to the mails into the complaint against diverting American vessels from the high seas into British ports, and to debate as to what constitutes contraband in the mails. The diversion of our vessels was of course a practice during the war of 1914-1918, against which we protested without result; it is the more irritating now, since American vessels may thus be compelled to violate American law by entering a combat zone. As to contraband, Secretary Lansing had again taken the ground out from under argumentation by admitting that bonds, stocks, checks, *et cetera*, were merchandise subject to the exercise of belligerent rights. Even the basis of protest against search of mails inward bound to the United States depends upon the general question as to whether the British blockade of export materials from Europe, whether mails or not, is illegal. If the diversion of American ships and mails into a British port is permissible for the outward voyage from the United States, it would seem equally permissible to divert mail inward bound to the United States, if such export blockade is admitted to be legal.

⁹ Department of State Bulletin, Vol. II, No. 31, Jan. 27, 1940.

¹⁰ Savage, *op. cit.*, II, p. 596.

¹¹ *Ibid.*, p. 528.

The British, in their note published on January 20, 1940, were able to offer further arguments in their own cause. They asseverated that it is in accord with international law for belligerents "to prevent intelligence reaching the enemy which might assist them in hostile operations," and that the Germans were using letter post to transmit military intelligence and to promote sabotage. Furthermore, the British observed, the Germans "have destroyed, without previous warning or visit, in defiance of the rules of war," various ships known to be carrying mails, yet the United States had made no protest to the German Government at this destruction of postal correspondence. His Majesty's Government, it was said, does not confiscate or destroy "genuine correspondence"; on the contrary, it will forward such "innocent mails" as rapidly as possible. According to newspaper reports of February 24, American mails have been so much speeded that the dispute has passed beyond the stage of serious controversy.

Thus, the rights of the neutral, in his ancient controversy with the belligerent, continue to be whittled away. The Hague Convention independently provided for complete inviolability of the mails. They were not made subject to the law of contraband; on the contrary, it was understood that while the ship could be searched, "the correspondence is forwarded by the captor with the least possible delay." This position, however, was surrendered by Secretary Lansing when he admitted that the right to search for contraband took precedence over the conventional immunity of the mails; his surrender was complete when he listed certain articles capable of being carried within the covers of a sealed envelope as "merchandise," subject to capture as contraband. At this point, the debate ceases to be one of inviolability of mails; it now becomes part of the controversy over visit, search, and seizure of contraband goods. Here, too, of course, the belligerent has been extending, at his pleasure, both the method of search and the list of articles subject to capture. He may now order a neutral vessel to leave its course, go into one of his ports, and there await search at his pleasure, at great cost to the neutral. Apparently, the British Government could now order a neutral aeroplane, flying between neutral ports, such as the American "Clippers," to land at one of its ports for search. With respect to articles which can be seized, the belligerent now lists as contraband anything which it may regard as of value to the enemy (or to itself?), even when contained within a sealed envelope. And the procedure has now been expanded to cover articles of export from the enemy to a neutral and, by application of the doctrine of continuous voyage in reverse, to exports from a neutral to a neutral. The inviolability of the mails has now become merged in, and subsidiary to, other principles of the law of neutrality—of which law little remains!

The viewpoint from which the belligerent may seek to justify these continued invasions of the rights of a neutral was stated by Secretary Lansing,

in a memorandum prepared on October 13, 1916,¹² from which the following is quoted:

In large measure the limitations upon neutrals which result from the exercise of belligerent rights on the high seas cause inconvenience and loss to neutrals in their commercial enterprises. It is a consequence which is considered unavoidable and is submitted to because of the recognition of the supreme right of a nation to defend itself by preventing aid from reaching its enemy.

From the viewpoint of the neutral, it may be suggested that much more is at stake, in the interdependent life of the modern world, than mere "commercial enterprises." It may even be suggested that the neutral also has a "supreme right to defend itself"; the injuries which it may suffer as a result of belligerent interference may be as important to it as those for which the belligerents originally went to war. In so far as the mails are concerned, they are an indispensable part of the economic and financial system upon which the life of a state may depend. The neutral may complain, further, that censorship of its mails reveals to the belligerent important trade secrets which may be used for the benefit of the belligerent and to the disadvantage of the neutral. And, in general, the neutral increasingly complains of a system which permits war to exist, causing great loss and suffering to neutrals through no fault of their own.

Whether it is sufficiently to the advantage of Great Britain to search the mails, at great effort on their own part, and at the risk of causing friction with neutrals, is a matter for their statesmen to decide. So far as international law is concerned, there can be little doubt that the law of neutrality is increasingly violated by all belligerents. The neutral is at a disadvantage in this situation, since he must, if he wishes to protect his rights, fight all the belligerents. The only hope for the neutrals is a combination of all the neutrals, under the leadership of the United States, and preferably made before a war begins. But the belligerent has no fear of this, since the United States has taken the position, in its neutrality legislation, that it will not protect its neutral rights. So long as we take this attitude, the British and the Germans are free to do as they please; and we must submit meekly to the "supreme right" of the warmaker.

CLYDE EAGLETON

STANDARDS OF HUMANITARIANISM IN WAR

The familiar question of whether war is the complete antithesis of law may find at least a partial answer in the operation of rules relating to prisoners of war. It is of course possible to argue that observance of certain decencies in this respect but reflects the common principles of humanity underlying the national law of all civilized peoples, a kind of *code d'honneur*

¹² Savage, *op. cit.*, II, pp. 530-531.

which keeps war from being ruthless savagery, and which would obtain even if there were no international law. The fact is that rather definite standards of treatment are now set by treaty provision and, from whatever motivation, the party states are committed to their observance, not only as toward an opposing belligerent, but also as a matter of legal duty toward neutral states that are also parties to the collective instruments.

That the human problem involved can be a tremendous one will quickly appear from statistics concerning prisoners in the World War of 1914-1918. One estimate places the number of those captured in that war at ten millions.¹ This figure doubtless included civilians interned in belligerent countries and combatants interned in neutral countries. The number of Russians who were prisoners has been computed at from two millions to more than three and three-quarters millions.² The number of enemy persons in British hands in January, 1919, was about half a million.³ Exact figures are not always easy to obtain because of the common practice of referring to interned alien civilians in the same category with prisoners of war.

The problem has already acquired considerable proportions in the course of the struggles now going on. There are reports that 285,000 Polish prisoners of war are at work in Germany.⁴ The list of them, kept at the central agency of the Red Cross, comprises thousands of pages.⁵ There is reliable evidence of regard for humanitarianism in the handling of captives taken on the Western Front. Field Marshal Goering is reported to have signed an order for the treatment of all captured Royal Air Force crews as officers and gentlemen.⁶ Upon the outbreak of war the International Committee of the Red Cross promptly began to function for the purpose of establishing bureaus and channels of communication with the respective governments, and there are already available reports of visits to prison camps in Germany, France, and Great Britain, and even to camps in Egypt where some German nationals were interned after Egypt broke off diplomatic relations with Germany.⁷

¹ Renée Marguerite Frick-Cramer, "*A propos des projets de conventions internationales réglant le sort des prisonniers*," *Revue internationale de la Croix-Rouge*, No. 74 (Feb., 1925), pp. 73-84.

² The Cost of the War to Russia, in Russian Series, No. 12, Economic and Social History of the World War (1932), p. 135.

³ Statistics of the Military Effort of the British Empire, 1914-1920 (1922), pp. 630-631. General Pershing's Final Report (1919) showed that on Nov. 11, 1918, there were 248 American officers and 3,302 men in the hands of the Germans (p. 86). For references in this note and in the two preceding, the writer is indebted to Mr. W. E. S. Flora, of the Duke University Graduate School.

⁴ New York Times, Jan. 28, 1940, I:3:4.

⁵ *Revue internationale de la Croix-Rouge*, No. 251 (Nov., 1939), p. 897.

⁶ New York Times, Feb. 6, 1940, p. 15. The reference to treatment as officers may be of some practical importance, as under existing international rules officers may not be required to work in the captor country.

⁷ *Revue internationale de la Croix-Rouge*, No. 252 (Dec., 1939), pp. 961-974. For a state-

The treaty method of trying to deal with this problem has long been in use. While still under the Articles of Confederation, the United States included in its Treaty of Amity and Commerce with Prussia, September 10, 1785,⁸ an article on this subject. The provisions in this article (XXIV) are ascribed to the humanitarianism of Benjamin Franklin, who signed the treaty. There is a comparable article in the 1799 treaty with Prussia, which was renewed in 1828.⁹ It is natural that parties to commitments of the kind in conventions should relate these obligations to those under customary international law. By a cartel with Great Britain, dated May 12, 1813, the United States undertook to treat prisoners according to "usage and practise of the most civilized nations during war."¹⁰ When the Treaty of Guadalupe-Hidalgo was being negotiated, the Mexican Commissioners in their first draft copied the article concerning prisoners which the United States had accepted with Prussia in 1785 and, with the modifications thought necessary by Nicholas P. Trist, the American negotiator, the provisions became a part of the treaty.¹¹

The method of protection through general multilateral instruments is a fairly recent development. At the time of the World War, 1914 to 1918, reliance was placed upon Hague Convention IV of 1907, as supplemented by bilateral agreements drawn up in the course of the war. The expectation of humanitarian treatment as a matter of right now centers especially in the Convention of July 27, 1929.¹² Among its provisions are those prohibiting reprisals against prisoners, restricting the types of employment and the places where captives may be required to work, assuring for those injured in the course of work the same benefits as are applicable to laborers of the same class according to legislation of the detaining state, limiting the freedom of the captor state in the matter of disciplinary action against prisoners, assuring adequate food, clothing and shelter, sanitation, medical care, limited correspondence under censorship, and some opportunities for worship, intellectual activity, and recreation. Captors may not require work directly related to war operations, nor that which is unhealthful or dangerous. For work connected with camps, prisoners are not to receive wages. In the

ment on the extent to which the International Committee of the Red Cross may take steps toward investigating an alleged violation of the existing conventions or "de règles du droit des gens protégeant des intérêts humanitaires," see the *Revue* cited, No. 249 (Sept., 1930), pp. 766-769.

⁸ 8 Stat. 84, 96-98. The parties proposed to pledge themselves "to each other, and to the world." (Dip. Corr., U. S., Sept. 10, 1783, to March 4, 1789, II (1833), pp. 52, 230, 237.)

⁹ 8 Stat. 162, 174-176, 378-387. On these treaties generally, see J. S. Reeves, "The Prussian-American Treaties," this JOURNAL, Vol. 11 (1917), pp. 475-510.

¹⁰ II Miller, *Treaties*, p. 557.

¹¹ V *ibid.*, pp. 233, 307, 313.

¹² Text in 47 Stat., pt. 2, pp. 2021-2073, also in this JOURNAL, Vol. 27 (1933), Supp., pp. 59-91. There is a brief comment on the work of the conference which produced the convention by W. P. Cresson, in this JOURNAL, Vol. 24 (1930), pp. 148-151. See also Paul Des Gouttes, *Commentaire de la Convention de Genève du 27 juillet 1929* (1930).

case of other labor, unless there is some special agreement between belligerents, work for the captor state is to be paid for at the rate in force for soldiers of that state doing the same work. Work for account of other public administrations or for private persons is to be done under conditions arranged for by agreement with the military authority.

Among the multilateral treaty provisions with which neutral states are likely to be concerned are those relating to exemptions from postal charges. The pertinent parts of Article 38 of the 1929 Convention¹³ may be compared with Article 49 of the Universal Postal Convention, 1934.¹⁴ By the latter, correspondence to and from prisoners of war, as also correspondence concerning prisoners which is sent to or received by information offices in countries of origin or destination or in neutral countries where persons may be interned (those interned in neutral countries being assimilated to prisoners of war for this purpose), is to be "exempt from all postal charges." If this is to be applied only as to members of the armed forces of belligerents, the position of civilians interned as alien enemies may be, in this matter as in others, less carefully safeguarded by treaty than is that of captured or interned combatants.

In general, the plan now operative contemplates that application of the treaty rules agreed to shall be facilitated through the assistance of neutral "protecting Powers charged with safeguarding the interests of belligerents,"¹⁵ as well as through the humanitarian activity of the Red Cross. Over against certain evidences, already referred to, of conformity to basic rules, may be set reports of mistreatment, suffering and privations of prisoners.¹⁶ Great Britain and the Dominions, France, Poland, Germany and China are parties to the 1929 Convention. Russia, Japan and Finland are not, but each of these states has accepted the somewhat less detailed provisions annexed to Hague Convention IV of 1907.¹⁷ Ample opportunity will doubtless be

¹³ "Letters and consignments of money or valuables, as well as parcels by post intended for prisoners of war or dispatched by them, either directly, or by the mediation of the information bureaus provided for in Article 77, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

"Presents and relief in kind for prisoners shall be likewise exempt from all import and other duties, as well as of payments for carriage by the State railways."

¹⁴ 49 Stat., pt. 2, pp. 2741, 2768-9. The Soviet Union is not a party.

For statement of United States practice under the Postal Convention, see U. S. Official Postal Guide, July, 1939, pt. II, p. 18, Sec. 32 (a), and Nov., 1939, Supp., p. 10; also U. S. Official Postal Bulletin, Vol. LX, No. 17797 (Oct. 13, 1939). It is noted that "the freedom from postage does *not* apply to parcel-post packages exchanged with prisoners of war."

¹⁵ Art. 86 of the 1929 Convention.

¹⁶ See the reported suffering of certain Polish prisoners, New York Times, Feb. 11, 1940, I:33:4, and reported Finnish accusations that prisoners were being used by their enemies as shields for infantry, *ibid.*, Feb. 15, 1940, p. 2. See also Shuhsi Hsü, The War Conduct of the Japanese (1938), pp. 93-108, 137-146, and the same author's A Digest of Japanese War Conduct (1939), pp. 4-12.

¹⁷ Text in 36 Stat., pt. 2, pp. 2277, 2296-2301.

found, during the current contests of arms, to estimate the utility of agreements now in force. It remains to be seen how far the standards will be complied with amid the further exigencies of war. Standards of the 1929 "code" are high, and enforcement to the letter may put belligerents to a definite test. It is difficult to see how flagrant disregard of principles underlying the rules could in the long run work to the advantage of any belligerent.

ROBERT R. WILSON

COÖPERATION OF THE UNITED STATES IN CONSERVATION OF WHALES

On March 31, 1932, the United States signed the International Convention for the Regulation of Whaling which was opened for signature at Geneva on September 24, 1931. The purpose of the convention was "to secure effective international action for the preservation of whales from indiscriminate and wasteful slaughter."¹ The convention became effective on January 16, 1935, on which date it was proclaimed by the President of the United States.² The Whaling Treaty Act to give effect to this convention was approved by the President on March 1, 1936.³

As a result of subsequent conferences for the regulation of whaling, the International Agreement for the Regulation of Whaling was signed at London on June 8, 1937, and became effective May 7, 1938,⁴ and the Protocol amending the Agreement of June 8, 1937, signed at London June 24, 1938, became effective as to the United States March 30, 1939.⁵ These additional international commitments with respect to whaling provided a closed season on the killing of hump-back whales because they were threatened with extinction,⁶ set aside a sanctuary in which whales could not be killed, and restricted the killing of whales in the Antarctic region to a period from December 8 to March 7 of each year. These measures were taken with a view of preventing the killing of whales during the breeding season and while they were accompanied by calves.

In order to comply with these new international obligations, it is necessary to have further legislation enacted by the Congress. Accordingly, Senator Gillette of Iowa introduced S. 1045 in the 76th Congress, First Session, to give effect to these commitments, and the bill passed the Senate on March 8, 1939. Due to objections from the operating companies presented before the House Committee on Foreign Affairs, a report on the bill was delayed.

On March 12, 1940, Representative Sol Bloom, Chairman of the Committee on Foreign Affairs, introduced H. R. 8895, entitled "A Bill to enable the United States to carry out its international obligations concerning the

¹ Report of the Secretary of State, May 27, 1932.

² The convention was printed in this JOURNAL, Supplement, Vol. 30 (1936), p. 167.

³ 49 Stat. 1246; this JOURNAL, *ibid.*, p. 198. For a detailed discussion of this convention and Act, see note by William R. Vallance, this JOURNAL, Vol. 31 (1937), p. 112.

⁴ 52 Stat. 1460; this JOURNAL, Supp., p. 106. ⁵ 53 Stat. 1794; this JOURNAL, Supp., p. 115.

⁶ See article by Dr. Remington Kellogg, National Geographic Magazine, February, 1940.

regulation of whaling, and for other purposes." It is hoped that favorable action may be taken on this legislation at an early date. Action has already been taken to give effect to these agreements by other countries that are parties to them, and unless the United States does so, it may be subject to criticism for failure to do its part in carrying out this salutary international agreement.

Although Japan has not thus far become a party to these agreements, it has taken effective measures to cooperate in the conservation program by the enactment of legislation which in general is in conformity with the provisions of the convention and supplementary agreements.⁷

Reference is made to the fact that unless action is taken at the present session of Congress, the pending legislation will be lost and it will be necessary to start over again in the efforts to obtain enactment of this very desirable legislation.

The conservation of whales, like certain other forms of life, escapes regulation and protection by any one state, so that international cooperative action becomes essential. At the present time this is often difficult to secure, but it is especially important that we should be found in the first rank among the nations cooperating for this purpose of general interest to the whole world.

Instances of similar international cooperative efforts of conservation may be noted in the cases of the fur-bearing seals frequenting Pribilof Islands,⁸ migratory birds,⁹ the North Pacific halibut fisheries,¹⁰ and the Pacific salmon fisheries.¹¹ The United States and Mexico have also entered into a bilateral treaty for the protection of migratory birds and game mammals.¹²

ELLERY C. STOWELL

⁷ Ordinance No. 19, promulgated on July 25, 1934, by the Ministry of Agriculture and Forestry, as revised by Ordinance No. 22 of June 8, 1938.

⁸ See conventions of 1911, this JOURNAL, Supplement, Vol. 5 (1911), p. 267, and Vol. 6 (1912), p. 162.

⁹ See convention of 1916 between Great Britain and the United States, *ibid.*, Vol. 11 (1917), p. 62; convention of 1936 between Mexico and the United States, *ibid.*, Vol. 31 (1937), p. 139; and Migratory Bird Treaty Act of 1918, amended in 1936, *ibid.*, pp. 142 and 145.

¹⁰ See convention of 1930 between Canada and the United States, *ibid.*, Vol. 25 (1931), p. 188, and revision of 1937, *ibid.*, Vol. 32 (1938), p. 71.

¹¹ See convention of 1930 between Canada and the United States, *ibid.*, p. 65.

¹² February 7, 1936, 50 Stat., Pt. II, 1311.

CURRENT NOTES

NOTICE OF PROPOSED REVISION OF THE SOCIETY'S CONSTITUTION

Pursuant to the action of the Executive Council at its meeting on April 29, 1939, the Committee on Organization submitted a general revision of the Society's Constitution to a special meeting of the Executive Council called for that purpose and held in Washington, March 16, 1940. The Committee on Organization and the Executive Council unite in recommending for adoption the proposed revision of the Constitution except in regard to the provisions relating to the Executive Council (Articles IV and VI); on these two articles, alternate amendments are laid by the Committee on Organization before the Society for its consideration and action under the reference of the Executive Council contained in the extract from the minutes of its meeting of March 16, 1940, printed *infra*, p. 332. The amendments drafted by the Committee are printed as the first alternate in each case.

Present Constitution

ARTICLE I

Name

This Society shall be known as the American Society of International Law.

ARTICLE II

Object

The object of this Society is to foster the study of international law and promote the establishment of international relations on the basis of law and justice. For this purpose it will coöperate with other societies in this and other countries.

ARTICLE III

Membership

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the American Journal of International Law issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Proposed Revision

ARTICLE I

Name

No change.

ARTICLE II

Object or Purpose

The object of this Society is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it will coöperate with similar societies in this and other countries.

ARTICLE III

Membership

Annual Members. On the nomination of two members in regular standing new members may be elected by the Executive Council acting under such rules and regulations as it may prescribe. Annual members shall pay dues of five dollars and shall thereupon become entitled to all privileges of the Society including copies of the American Journal of International Law issued during the year. Upon failure to pay dues for one year a member may in the discretion of the Executive Council be suspended or dropped from membership.

The Council is authorized to establish a student membership upon such terms and with such dues as it shall determine.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause for which the Society is formed to promote, may be elected to honorary membership at any meeting of the Society on the recommendation of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

ARTICLE IV

Officers

The officers of the Society shall consist of a President, an Honorary President, three Vice-Presidents, such number of Honorary Vice-Presidents as may be fixed from time to time by the Executive Council, a Secretary, and a Treasurer, all of whom shall be elected annually, and of an Executive Council composed of the foregoing officers, *ex officio*, and twenty-four elected members, whose terms of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen. No elected member of the Executive Council shall be eligible for reelection

Student Members. Student memberships may be established by the Council upon such terms and with such dues as it shall determine.¹

Life Members. Upon payment of one hundred dollars any person eligible for annual membership may be elected by the Executive Council a life member and shall be entitled to all the privileges of annual members.

Honorary Members. Persons not citizens of the United States, who shall have rendered distinguished service to the cause which this Society is formed to promote may upon nomination of the Executive Council be elected to honorary membership by the Society. Only one honorary member may be elected in any one year. Such members have the full privileges of life membership but pay no dues.

ARTICLE IV (Alternate No. 1)

Officers

The officers of the Society shall consist of an Honorary President, a President, such number of Honorary Vice-Presidents as may be fixed from time to time by the Executive Council,² three Vice-Presidents, a Secretary and a Treasurer, all of whom shall be elected annually, but the President shall not be eligible for more than three consecutive annual terms.

The Secretary and the Treasurer shall be elected by the Executive Council. All other officers shall be elected by the Society except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee which shall consist

¹ Regulations regarding Student Memberships were adopted by the Executive Council, April 27, 1939. (See Proceedings of the Society for 1939, pp. x and 161; also the JOURNAL, Vol. 33 (1939), p. 563.)

² The present Constitution provides for the election of Honorary Vice-Presidents, the exact number to be fixed from time to time by the Executive Council: the actual number is now *fourteen*. The Committee proposes no new Constitutional provisions in regard to the number of Honorary Vice-Presidents, but has recommended to the Executive Council that no vacancies be filled until the actual number is reduced to ten, and that thereafter the number be not increased by the Council.

until the next annual meeting after that at which his term of office expires.

The Secretary and the Treasurer shall be elected by the Executive Council. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee, which shall consist of the five members of the Society receiving the highest number of ballots cast by the members at the first session of the Annual Meeting of the Society. The Executive Council may submit a list of nominees.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

of the five members receiving the highest number of ballots at the last session of the preceding annual meeting of the Society. Nominations for membership on the Committee may be made by the Executive Council or from the floor.

All officers shall be elected by a majority vote of the members present and voting.

All officers shall serve until their successors are chosen.

ARTICLE IV (Alternate No. 2)

Officers and Their Terms of Office

The officers of the Society shall consist of a President, an Honorary President, three Vice-Presidents, such number of Honorary Vice-Presidents as may be fixed from time to time by the Executive Council, a Secretary and a Treasurer, and of an Executive Council (hereinafter called the Council), composed of the foregoing officers *ex officio* and of twenty-four elected members having the powers and duties set forth in Article VI hereof.

The term of office of all officers except the Executive Council shall be one year; but the President shall not be eligible to election for more than three successive terms.

All officers shall be elected by the Society, except the Secretary and the Treasurer, who shall be elected by the Council, and except as hereinafter provided for filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee which shall consist of the five members receiving the highest number of ballots at the last session of the preceding annual meeting of the Society. Nominations for membership on the Committee may be made by the Council or from the floor.

All officers shall serve until their successors are chosen.

The term of office of the twenty-four elected members of the Council shall be three years. Eight members shall be elected by the Society each year and the service of Council members shall begin at the meeting of the Council immediately following the meeting of the Society at which they were

ARTICLE V

Duties of Officers

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council, or by vote of the Society.

2. The Secretary shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programs therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairmen, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman, who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

elected. The terms of office and the Council members already elected for those terms at the time this Constitution is revised shall continue unchanged. No elective member of the Council shall be eligible for reelection until at least one year after the expiration of his term. The Council shall have power to fill vacancies in its membership occasioned by death, resignation, failure to elect or for other causes. Such appointees shall hold office until the next annual election.

ARTICLE V

Duties of Officers

The President shall preside at all meetings of the Society and shall perform such other duties as the Executive Council may assign to him. In the absence of the President his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council, by the Society, or by the President.

The Secretary shall keep the records and conduct the correspondence of the Society and shall perform such other duties as may be assigned to him by the Society or by the Executive Council.

The Treasurer shall receive and have the custody of the funds of the Society and shall invest and disburse them subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

The officers shall perform the duties prescribed in Article VI or elsewhere in this Constitution.

ARTICLE VI (Alternate No. 1)

The Executive Council

There shall be an Executive Council herein termed the Council. The Council shall have charge of the general interests of the Society and shall possess the governing power except as otherwise specifically provided in this Constitution. The Council shall call regular and special meetings and arrange programs therefor, shall appropriate money, shall appoint from among its members committees and their chairmen with appropriate powers, and shall have power to arrange for the issue of a periodical or other publications.

The Council shall consist of the officers

[The following revision of Article V has been proposed by Mr. Charles Warren for adoption in conjunction with the second alternates of revised Articles IV and VI which he drafted. It has not been considered by the Executive Council nor submitted by the Committee on Organization, nor deposited with the Secretary in accordance with Article VIII of the present Constitution.]

ARTICLE V (Revision by Charles Warren)

Powers and Duties of the President, Secretary and Treasurer.

The President shall preside at all meetings of the Society and shall perform such other duties as the Society may assign to him. In his absence, his duties shall devolve upon one of the Vice-Presidents to be designated by him or by the Council or by the Society.

The President shall also be Chairman of the Council; but in case of his absence, the Council may elect a temporary Chairman.

The Secretary shall keep the records and conduct the correspondence of the Society and shall perform such other duties as may be assigned to him by the Society or by the Council. He shall also be the Secretary of the Council and shall keep its records and conduct its correspondence and shall perform such other duties as the Council may assign to him as such Secretary.

The Treasurer shall receive and have the custody of the funds of the Society and shall invest and disburse the same subject to the rules and under the direction of the Council. The fiscal year shall begin on the first day of January.

of the Society and twenty-four elected members whose terms of office shall be three years. Eight members shall be elected by the Society each year and the service of Council members shall begin at the meeting of the Council immediately following the meeting of the Society at which they were elected. The terms of office and the Council members already elected for those terms at the time this Constitution is revised shall continue unchanged. No elective member of the Council shall be eligible for reelection until at least one year after the expiration of his term. The Council shall have power to fill vacancies in its membership occasioned by death, resignation, failure to elect or for other causes. Such appointees shall hold office until the next annual election.

The President of the Society shall be the Chairman of the Council. In case of his absence the Council may elect a temporary chairman.

The Secretary of the Society shall be the Secretary of the Council. He shall keep the records and conduct the correspondence of the Council and shall perform such other duties as may be assigned to him by the Council.

Seven members shall constitute a quorum and a majority vote of those present shall be necessary for decisions.

Meetings of the Council shall be called by the Secretary on instructions of the President, or of a Vice-President acting for the President, or upon the written request of seven members of the Council.

ARTICLE VI (Alternate No. 2)

Powers and Duties of the Executive Council

The Council shall have charge of the general interests of the Society and shall possess the governing power except as otherwise specifically provided in this Constitution. It shall call regular and special meetings and arrange programs therefor, shall appropriate money, shall appoint from among its members committees and their chairmen with appropriate powers, and shall have power to arrange for the issue of a periodical or other publications.

Seven members shall constitute a quorum at its meeting and a majority vote of those present shall be necessary for decisions.

ARTICLE VI

Meetings

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

ARTICLE VII

Resolutions

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

ARTICLE VIII

Amendments

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments to the Constitution may be proposed by the Council, or by a communication in writing signed by at least five members of the Society and deposited with the Secretary within ten months after the previous annual meeting, and any amendments so deposited shall be reported upon by the Council at the succeeding annual meeting. All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon and no amendment shall be voted upon until the Council shall have made a report thereon to the Society.

ARTICLE VII

Meetings

Annual meetings of the Society shall be held at a time and place to be determined by the Executive Council. The chief purpose of the meetings is the presentation of papers, and discussions. The Society shall also elect officers and transact such other business as may be necessary.

Special meetings may be held at any time and place on the call of the Executive Council, or of the Secretary upon written request of thirty members. At least ten days' notice of a special meeting shall be given to each member of the Society by mail, such notice to specify the object of the meeting. No other business shall be transacted at such meetings unless admitted by a two-thirds vote of those present and voting.

Twenty-five members shall constitute a quorum at all meetings and a majority of those present and voting shall be necessary for decisions.

ARTICLE VIII

Resolutions

No change.

ARTICLE IX

Amendments

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments may be proposed by the Executive Council. They may also be proposed through a communication in writing signed by at least five members of the Society and deposited with the Secretary within ten months after the previous annual meeting. Amendments so deposited shall be reported upon by the Council at the next annual meeting.

All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon. No amendment shall be voted upon until the Council shall have made a report thereon to the Society.

Extract from the Minutes of the Executive Council of March 16, 1940

The revision of the provisions concerning the Executive Council recommended by the Committee on Organization in revised Article VI [alternate No. 1, above] was the subject of an extended discussion on the question whether the elective members of the Executive Council would be regarded as officers of the Society under the revised provisions, as they are stated to be in Article IV of the present Constitution. It was not practicable for the Executive Council to redraft these provisions in final form. . . . Article VI [alternate No. 1] of the revision was thereupon approved subject to the direction of the Council that the substantive provisions of Article IV of the present Constitution relating to the Executive Council be retained, and that these articles of the revision be referred back to the Committee on Organization with power to make such changes in the order of arrangement and terminology as it may see fit.

The foregoing proposed revision of the Constitution will be placed upon the agenda of the annual business meeting of the Society to be held on Wednesday forenoon, May 15, 1940 at the Carlton Hotel, Washington, D. C.

GEORGE A. FINCH,
Secretary

ANNUAL MEETING OF THE SOCIETY

The Thirty-fourth Annual Meeting of the American Society of International Law will be held in Washington at the Carlton Hotel on Monday, Tuesday and Wednesday, May 13, 14 and 15 next. The date of the Annual Meeting was postponed this year from April until May in order that the Society might meet during the Eighth American Scientific Congress, which will be held at Washington May 10-18.

The Society's Annual Meeting will open on Monday evening, May 13, with the presidential address by the Honorable Cordell Hull, Secretary of State, the President of the Society. Following Mr. Hull's address, the Honorable Huston Thompson, former Chairman of the Federal Trade Commission, will speak on "An International Trade Tribunal." The remainder of the evening will be devoted to an informal reception.

On Tuesday forenoon, May 14, the Society will meet jointly with Section IX on International Law, Public Law and Jurisprudence of the Scientific Congress to discuss problems of American neutrality. Mr. Lester H. Woolsey, former Solicitor of the Department of State, will present these problems from the North American point of view, and it is hoped that Dr. Juan A. Buero of Uruguay and perhaps some other speakers from Latin America will discuss these problems from their points of view. Following the presentation of the leading papers there will be general discussion from the floor.

On Tuesday afternoon, May 14, the general topic will be "Changing Concepts of International Law." Professor Joseph W. Bingham, of Stanford University Law School, will treat of the changing concepts of "Maritime jurisdiction in time of peace"; and Professor Herbert W. Briggs, of Cornell University, will address himself to the subject of "Non-recognition of title

by conquest and limitations on the doctrine." Both of these papers will be discussed from the floor following their presentation.

The general topic assigned for Tuesday evening, May 14, is "International Law and Organization." The subject will be subdivided into "Conflicting theories of international law," upon which the leading paper will be delivered by Professor Percy E. Corbett, of McGill University; "Post-war international organization," which will be the subject of an address by Professor J. Eugene Harley, of the University of Southern California; "Trends in the pacific settlement of international disputes by diplomatic procedures," on which the leading paper will be presented by Mr. H. Duncan Hall, formerly of the League of Nations Secretariat and visiting professor at Harvard University; and "Trends in international judicial settlement," which will be formally presented by Mr. James O. Murdock, of the Bar of the District of Columbia. All of these papers will be discussed from the floor after their presentation.

The concluding business of the Society will take place on Wednesday morning, May 15. The most important matter to be brought before the meeting will be action upon the revision of the Society's Constitution, in accordance with the notice printed herein, *post*, p. 326.

The meeting will close, as usual, with the annual dinner on the evening of Wednesday, May 15, at which Mr. Frederic R. Coudert of New York will act as Toastmaster. Secretary of State Cordell Hull has signified his intention of attending the dinner and an attractive list of speakers will be announced later.

In addition to the American Society of International Law, several other organizations interested in international legal subjects will also be meeting in Washington that week. The following schedule of the meetings of Section IX of the Eighth American Scientific Congress and affiliated meetings is published for the information of the members:

EIGHTH AMERICAN SCIENTIFIC CONGRESS

SEC. IX.—INTERNATIONAL LAW, PUBLIC LAW AND JURISPRUDENCE, AND AFFILIATED MEETINGS

FRIDAY, MAY 10, 1940

Morning and afternoon: Registration and tentative organization.

Evening: Formal opening of Congress.

SATURDAY, MAY 11, 1940

Morning: Definitive organization of Sections.

Afternoon: Trip to Mount Vernon.

Evening: Official reception.

SUNDAY, MAY 12, 1940

All day: Trip to Luray Caverns; luncheon at Luray, Virginia.

MONDAY, MAY 13, 1940

Morning: First plenary session.
Afternoon: Official luncheon.
Meeting of Section IX.
Evening: American Society of International Law.

TUESDAY, MAY 14, 1940

Morning: Joint session of Section IX and American Society of International Law.
Afternoon: American Society of International Law.
Tour by Section IX.
Evening: American Society of International Law.
Symphony concert.

WEDNESDAY, MAY 15, 1940

Morning: American Society of International Law.
Meeting of Section IX.
Afternoon: Luncheon.
Garden party.
Evening: Dinner of American Society of International Law.
Reception of American Law Institute.

THURSDAY, MAY 16, 1940

Morning: American Law Institute.
Afternoon: Meeting of Section IX.
Evening: Official banquet.

FRIDAY, MAY 17, 1940

Morning: American Law Institute.
Afternoon: Final session of Congress.
Evening: Leave for Williamsburg, Va., via river steamer.

SATURDAY, MAY 18, 1940

All day: In Williamsburg.
Evening: Depart for Washington.

SUNDAY, MAY 19, 1940

Morning: Arrive in Washington.

TUESDAY, MAY 21, 1940

All day: Eighth American Scientific Congress Day at New York World's Fair.

GEORGE A. FINCH,
Secretary

PROFESSOR THEODOR NIEMEYER

Theodor Niemeyer, a name long familiar to international lawyers, died in Berlin on October 20, 1939, at the age of almost 83. He is perhaps best known as the founder of the *Institut für internationales Recht* at Kiel, later taken over on Professor Niemeyer's retirement by the late Professor Schücking. To the end of his life he remained the editor of *Niemeyer's Zeitschrift*

für Völkerrecht. During its existence he edited the *Jahrbuch für Völkerrecht*. Among his better known works were his *Prinzipien des Seekriegsrechts* (1912) and a *Handbuch* on the same subject. In 1927 he edited a volume on disarmament (*Handbuch des Abrüstungs-problems*). After his retirement he renewed his life-long interest in classical studies and published a two-volume work on the history of the city of Rome.

After a short career in the public service, Dr. Niemeyer became first an instructor and in 1894 a full professor at the University of Kiel. In 1907 he was *Rektor* of the University. He founded the German Society of International Law and was the recipient of honors from many foreign scientific societies. He was a member of the Institute of International Law.

E. B.

SECTION OF INTERNATIONAL AND COMPARATIVE LAW OF AMERICAN BAR ASSOCIATION

All members of the American Society of International Law, whether or not they belong to the American Bar Association, are invited to the luncheon meeting of its Section of International and Comparative Law on Wednesday, May 15, 1940, at the Mayflower Hotel, Washington, D. C., at 12:30 o'clock p.m. Invitations have been extended also to members of the American Law Institute, the Federal Bar Association, and Section IX of the Eighth American Scientific Congress.

Mr. Charles A. Beardsley, President of the American Bar Association, will address the meeting. The following program has been arranged: consideration of a proposed constitution of an Inter-American Bar Association, means by which international and comparative law may be further emphasized in the curricula of law schools, and adoption of uniform commercial laws throughout the Americas. All persons present at the luncheon are invited to participate in the discussions.

Reservations (\$1.50 each) should be forwarded to Mr. Howard S. LeRoy, treasurer of the committee in charge, Colorado Building, Washington, D. C.

WILLIAM ROY VALLANCE

Chairman, Section of International and Comparative Law

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 16, 1939—FEBRUARY 15, 1940

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *R. A. I.*, Revue aéronautique internationale; *U. S. T. S.*, U. S. Treaty Series.

September, 1939

- 7 FRANCE—GREAT BRITAIN—POLAND. Agreement signed at London for a loan to Poland. *G. B. T. S.*, No. 43 (1939), *Cmd.* 6110.

October, 1939

- 7/17 CUBA—GREAT BRITAIN. Notes exchanged at Havana modifying commercial agreement of Feb. 19, 1937. Text: *G. B. T. S.*, No. 2 (1940), *Cmd.* 6152.
- 10 GREAT BRITAIN—TURKEY. Notes exchanged at Angora, amending agreement of May 27, 1938, regarding trade and clearing. Text: *G. B. T. S.*, No. 56 (1939), *Cmd.* 6133.
- 24 LEAGUE OF NATIONS—POLAND. The Polish Government reestablished its membership in the League and named as a permanent delegate Stanislas Strakacz. *N. Y. Times*, Oct. 25, 1939, p. 2.
- 25 LEAGUE OF NATIONS—POLAND. League of Nations announced receipt of a protest from the Polish Government-in-exile against the Russian action giving Wilno (Vilna) to Lithuania, and Lithuania's occupation of that area. *C. S. Monitor*, Oct. 25, 1939, p. 7.

November, 1939

- 6/17 UNITED STATES—VENEZUELA. Reciprocal trade agreement, signed at Caracas, Nov. 6, and proclaimed on the 17th by President Roosevelt. *D. S. B.*, Nov. 18, 1939, pp. 571-572. Analysis of general provisions: *D. S. B.*, Nov. 11, 1939, pp. 524-540.
- 14-21 FINANCE MINISTERS OF THE AMERICAN REPUBLICS. Meetings were held at Guatemala City. Final Act signed by representatives of 20 countries. Text: *D. S. B.*, Dec. 2, 1939, pp. 625-631; *P. A. U.*, Feb. 1940, pp. 67-70.
- 17 ALLIED SUPREME ECONOMIC COUNCIL. Establishment announced in joint statement by Prime Minister Chamberlain and Premier Daladier after third meeting of Supreme War Council. *N. Y. Times*, Nov. 18, 1939, p. 1; text: p. 3; *London Times*, Nov. 18, 1939, p. 6.
- 17/December 14 TRAVEL IN COMBAT AREAS. Departmental orders of the Department of State set forth regulations for travel in combat areas and on belligerents' vessels. Texts: *D. S. B.*, Nov. 18 and Dec. 16, 1939, pp. 553-555, 686; *N. Y. Times*, Nov. 19 and Dec. 17, 1939, pp. 36 and 39. Text of order regarding the Bay of Fundy: *D. S. B.*, Jan. 20, 1940, p. 56.

- 18 GREAT BRITAIN—POLAND. Agreement signed in London to make provision for cooperation of certain units of the Polish naval forces with the British Navy. *London Times*, Nov. 20, 1939, p. 5.
- 21 ALBANIA. New British Consul-General in Albania left Rome to take up his appointment, this constituting *de facto* recognition of the Italian union with Albania. *London Times*, Nov. 22, 1939, p. 7.
- 21 GERMANY—SLOVAKIA. Treaty signed at Berlin ceding to Slovakia 225 sq. mi. of territory annexed by Poland in 1920, 1924 and 1938. *N. Y. Times*, Nov. 22, 1939, p. 8.
- 21 GREAT BRITAIN—POLAND. League of Nations announced that Great Britain has given notice of its suspension of the naval agreement with Poland, signed at London, Apr. 27, 1938. *L. N. M. S.*, Nov. 1939, p. 424; *N. Y. Times*, Nov. 22, 1939, p. 2.
- 21 GREAT BRITAIN—SOVIET RUSSIA. League of Nations announced that Great Britain has given notice of its suspension of the naval agreement with Russia, signed at London, July 17, 1937. *L. N. M. S.*, Nov. 1939, p. 424; *N. Y. Times*, Nov. 22, 1939, p. 2.
- 21 LIBERIA—UNITED STATES. Ratifications exchanged at Monrovia of: (1) extradition treaty of Nov. 1, 1937; (2) consular convention of Oct. 7, 1938; (3) treaty of friendship, commerce and navigation of Aug. 8, 1938. *D. S. B.*, Nov. 25, 1939, pp. 604-606. Proclaimed Nov. 30 by President Roosevelt. *D. S. B.*, Dec. 2, 1939, p. 643.
- 21-December 3 LABOR CONFERENCE OF AMERICAN STATES. Second regional conference of American States, members of the International Labor Organization, met at Havana. The "Declaration of Havana," advocating international cooperation, international peace and security by eliminating war as an instrument of national policy, and pledging social solidarity of the Americas, was adopted Nov. 30. Summary of address by John G. Winant: *N. Y. Times*, Dec. 2, 1939, p. 8. Text of Declaration of Havana and Mr. Winant's speech: *Cong. Rec.* (daily), Feb. 29, 1940, Vol. 86, pp. 3359-3360. Mexico invited third conference to meet at Mexico City. *N. Y. Times*, Dec. 3, 1939, p. 31.
- 21/December 5 NAVICERT. Announcement made Nov. 21 of exchange of notes by Great Britain and the United States providing for certification of ship cargoes at United States ports, to facilitate passage through blockaded waters. In force Dec. 1, 1939. *N. Y. Times*, Nov. 22, 1939, p. 3; *London Times*, Nov. 22, 1939, p. 5. Announcement made on Dec. 5 that the system has been extended to certain neutral European countries. *London Times*, Dec. 6, 1939, p. 5.
- 21-December 10 BLOCKADE. Prime Minister Chamberlain announced "exports of German origin or ownership" subject to seizure by the Allied navies. Text: *London Times*, Nov. 22, 1939, p. 8; *N. Y. Times*, Nov. 22, 1939, p. 6. French Government made similar announcement Nov. 22. *N. Y. Times*, Nov. 23, 1939, p. 8; *B. I. N.*, Dec. 2, 1939, p. 1331. On Nov. 23 The Netherlands made a formal *démarche* to the British Foreign Office, reserving all rights under international law. *N. Y. Times*, Nov. 24, 1939, p. 1. Italian communiqué of Nov. 24 protested the blockade plans. Text: *N. Y. Times*, Nov. 25, 1939, p. 1. Japan and Sweden protested Nov. 25; Norway, Nov. 27; Germany on Nov. 29. *N. Y. Times*, Nov. 26, 1939, pp. 1, 37; Nov. 30, p. 3; *London Times*, Nov. 30, 1939, pp. 7, 8; *B. I. N.*, Dec. 16, 1939, p. 1412. France issued decree Nov. 27, similar to the British. *London Times*, Nov. 29, 1939, p. 7; *B. I. N.*, Dec. 16, 1939, p. 1393. Order in Council making the blockade effective Dec. 5 was signed by King George on Nov. 27. Text: *N. Y.*

- Times*, Nov. 29, 1939, p. 2; *London Times*, Nov. 29, 1939, p. 4. United States note of Dec. 7 reserved right to claim reparation for damages to American interests. *N. Y. Times*, Dec. 8, 1939, p. 4; text: Dec. 9, 1939, p. 4; *D. S. B.*, Dec. 9, 1939, p. 651. Russian note of Dec. 10 reserved its right to demand compensation. *N. Y. Times*, Dec. 11, 1939, p. 10.
- 22 GREAT BRITAIN—TURKEY. Notes exchanged at London regarding commercial relations. Text: *G. B. T. S.*, No. 1 (1940), *Cmd.* 6151.
- 23 SUBMARINE MINES. German Admiralty spokesman denied Germany had violated the Hague Convention of 1907 regarding laying of mines in a commercial shipping lane without warning, and declared Great Britain had made its coastal waters a military zone. *N. Y. Times*, Nov. 24, 1939, p. 4.
- 24 GREAT BRITAIN—UNITED STATES. Ratifications exchanged at London of trade agreement of Nov. 17, 1938, which will enter into force definitively Dec. 24, 1939. *D. S. B.*, Nov. 25, 1939, p. 604; *N. Y. Times*, Dec. 8, 1939, p. 6. Proclaimed Dec. 6 by President Roosevelt. *D. S. B.*, Dec. 9, 1939, p. 670.
- 25 TRANSFER OF TITLE OF EXPORTS. Department of State issued regulations, supplementing those of Nov. 10, 1939, regarding transfer of title. Text: *D. S. B.*, Nov. 25, 1939, p. 588.
- 26—December 1 RUSSO-FINNISH WAR. Russian note of Nov. 26 charged Finland with killing Russian soldiers on Soviet soil, and demanded withdrawal of Finnish troops from the border north of Leningrad. *London Times*, Nov. 27, 1939, p. 6; *N. Y. Times*, Nov. 27, 1939, p. 1; text: p. 3. Finnish note of Nov. 27 offered to withdraw troops if Russia did likewise. *N. Y. Times*, Nov. 28, 1939, p. 1; text: p. 6. Soviet note of Nov. 28 denounced non-aggression pact of 1932 with Finland. Text: *N. Y. Times*, Nov. 29, 1939, p. 8; *London Times*, Nov. 29, 1939, p. 8. On Nov. 29 Premier Molotoff's speech severed diplomatic relations. *N. Y. Times*, Nov. 30, 1939, p. 1. Text: *London Times*, Nov. 30, 1939, p. 8. Corrected text: *N. Y. Times*, Dec. 1, 1939, p. 10; text of official Soviet announcement: p. 4; text of Finnish reply: p. 5. U. S. Department of State tendered its good offices. Text of offer: *N. Y. Times*, Nov. 30, 1939, p. 1; *D. S. B.*, Dec. 2, 1939, p. 609. President Roosevelt sent messages Nov. 30 appealing to both governments not to bomb civilian populations. Text: *N. Y. Times*, Dec. 1, 1939, pp. 1, 11; *D. S. B.*, Dec. 2, 1939, pp. 609-610. Russian reply of Dec. 1 denied bombing civilians and disclaimed intent to do so in future. *N. Y. Times*, Dec. 2, 1939, p. 4. Text of Finnish reply of Dec. 1: *D. S. B.*, Dec. 9, 1939, p. 650.
- 29/30 MEXICAN AGRARIAN CLAIMS. By an exchange of notes it was agreed to extend to May 31, 1940, the period for the adjudication of claims of American citizens, whose farm properties have been expropriated since Aug. 30, 1927. *D. S. B.*, Dec. 2, 1939, p. 631.
- 30 JAPAN—THAILAND (SIAM). Agreement signed at Bangkok for operation of regular air services between the two countries. Text: *Journal of International Law and Diplomacy* (Tokyo), Jan. 1940.

December, 1939

- 1 RUMANIA. Government forbade access to Rumanian ports and territorial waters to ships equipped with more than two 6-inch guns. *N. Y. Times*, Dec. 2, 1939, p. 3.
- 1—February 1, 1940 RUSSO-FINNISH WAR. Russia announced its formal recognition on Dec. 1 of the "People's Government of Finland." *N. Y. Times*, Dec. 1, 1939, p. 1; text of declaration by Finnish "Red" régime: p. 4. Mutual assistance and friend-

- ship pact signed at Moscow Dec. 2 between the People's Government at Terijoki and the Soviet. Text: *N. Y. Times*, Dec. 3, 1939, p. 53. Text of President Roosevelt's request for an embargo on planes to Russia: p. 1. Russian notes, handed to heads of missions in Moscow, announced a blockade in Finnish territorial waters, effective Dec. 8. *N. Y. Times*, Dec. 8, 1939, p. 1. Official announcement: *N. Y. Times*, Dec. 10, 1939, p. 42. Finnish Government asserted Dec. 8 that the blockade is illegal since no declaration of war had been made. *N. Y. Times*, Dec. 9, 1939, p. 3. Finnish Parliament appealed Dec. 10 for active help from other nations. *N. Y. Times*, Dec. 11, 1939, pp. 1, 3. President Kallio of Finland, in an address before the Diet on Feb. 1, called on Russia to negotiate an honorable peace. *N. Y. Times*, Feb. 2, 1940, p. 2.
- 2/January 4, 1940 MEXICAN OIL. Mexican Supreme Court ruled against 17 oil companies by unanimous decision. *N. Y. Times*, Dec. 3, 1939, pp. 1, 36. Fourteen foreign-owned oil companies were declared in default Jan. 4 because of not having appointed valuers. *N. Y. Times*, Jan. 5, 1940, p. 3.
- 3/5 LEAGUE OF NATIONS—FINLAND. The Secretary-General of the League embodied in a letter to Soviet Russia the Finnish permanent delegate's communication of Dec. 3, protesting Russian aggression, to which Foreign Commissar Molotoff replied Dec. 5, stating that his government did not recognize the régime which entered the protest. Texts: *N. Y. Times*, Dec. 5, 1939, p. 18.
- 4/28 LITHUANIA—UNITED STATES. Parcel post agreement signed at Kaunas and Washington. In force Feb. 1, 1940. *D. S. B.*, Jan. 20, 1940, p. 88.
- 7 SCANDINAVIAN STATES CONFERENCE. The Foreign Ministers of Denmark, Sweden and Norway, meeting at Oslo, decided to exert all possible efforts for settling Russo-Finnish war through the League of Nations. *N. Y. Times*, Dec. 8, 1939, p. 13; *B. I. N.*, Dec. 16, 1939, p. 1413.
- 9 LEAGUE OF NATIONS COUNCIL. At a private meeting on Dec. 9 the 106th session of the Council voted to refer Finnish protest against Soviet aggression to the Assembly, meeting on the 11th. The Russian, Iranian and Peruvian members were absent. *N. Y. Times*, Dec. 10, 1939, pp. 1, 50.
- 9 STANDSTILL AGREEMENT. Announcement made that a new agreement on German short-term credits had been signed to take the place of the agreement which terminated Sept. 3, 1939. Provisions: *N. Y. Times*, Dec. 11, 1939, p. 33.
- 10 FINLAND—UNITED STATES. The United States opened credits to Finland, through Export-Import Bank and Reconstruction Finance Corporation, in the amount of ten million dollars for the purchase in the United States by Finland of agricultural surpluses and other civilian supplies. *N. Y. Times*, Dec. 11, 1939, p. 1.
- 11 BULGARIA—SOVIET RUSSIA. Air convention signed at Sofia. *B. I. N.*, Dec. 16, 1939, p. 1385.
- 11-14 LEAGUE OF NATIONS ASSEMBLY. At opening meeting of the 20th session, presided over by Dr. Carl J. Hambro, the Assembly elected a Committee of 13 (France, Great Britain, Uruguay, Bolivia, Venezuela, Egypt, Canada, India, Thailand, Portugal, Ireland, Norway and Sweden), which sent a telegram to Soviet Russia calling for a cessation of the Finnish invasion and submission of the dispute to arbitration. Twenty-four hours were allowed for a reply. *N. Y. Times*, Dec. 12, 1939, pp. 1, 2. Russian reply rejected mediation by the League. Text: *N. Y. Times*, Dec. 13, 1939, p. 1. The Committee of 13 approved and submitted to the Assembly on Dec. 13 a resolution to name Russia as an aggressor against Finland. Text of resolution: *N. Y. Times*, Dec. 14, 1939, p. 6. Report and resolution were unanimously adopted Dec. 14. *N. Y. Times*, Dec. 15, 1939, pp. 1, 16.

- 12 FRANCE—GREAT BRITAIN. Announcement made that an agreement had been reached to stabilize their currencies at the rate of 176½ francs to the pound until six months after the signing of the peace treaty. Five main points: *N. Y. Times*, Dec. 13, 1939, pp. 1, 13; *London Times*, Dec. 13, 1939, p. 3.
- 12 GERMANY. Issued a White Book with the English title, "Documents for the Period Preceding the War." *London Times*, Dec. 13, 1939, p. 7; *B. I. N.*, Dec. 30, 1939, p. 1464; *N. Y. Times*, Dec. 13, 1939, p. 11.
- 13 PORTUGAL—SPAIN. Commercial agreement signed at Madrid. In force Jan. 1, 1940. *N. Y. Times*, Dec. 14, 1939, p. 15.
- 14 GERMANY—SOVIET RUSSIA. Ratifications exchanged at Berlin of treaty of Oct. 4, 1939, fixing Russo-German frontier, and amity treaty, signed Sept. 28, 1939. *N. Y. Times*, Dec. 15, 1939, p. 12.
- 14 LEAGUE OF NATIONS COUNCIL. 107th session of Council, with Mr. M. A. Costa du Rels of Bolivia, presiding, adopted a resolution that Russia, having violated the Covenant by invading Finland, had removed itself from membership in the Assembly and Council. *L. N. M. S.*, Sp. supp., Dec. 1939, pp. 69-70; *London Times*, Dec. 15, 1939, p. 8. Finland, China and Yugoslavia abstained from voting. South Africa and Egypt, newly elected, and China, reelected, with France, Great Britain, Bolivia, Belgium and the Dominican Republic, constitute the additional members. *Geneva Research Centre, Information Bulletin*, Dec. 20, 1939, p. 6.
- 14-January 3, 1940 GERMAN-AMERICAN MIXED CLAIMS. In the District of Columbia court the Lehigh Valley Railroad Company strove to force payment of the award from the \$24,000,000 balance of the German deposit account in the United States Treasury. *N. Y. Times*, Dec. 15, 1939, p. 3. On Jan. 3, 1940, the complaint brought by the Z. and F. Assets Realization Corporation of New York City, and other complainants, that they had vested interests in the funds, was dismissed. *N. Y. Times*, Jan. 4, 1940, p. 8.
- 14/January 20, 1940 GREAT BRITAIN—UNITED STATES. Secretary of State Hull sent note Dec. 14 relative to contraband control and stopping of United States ships for examination of cargo. Text: *N. Y. Times*, Jan. 6, 1940, p. 2; *D. S. B.*, Jan. 6, 1940, p. 4. Aide-memoire sent by Secretary Hull on Jan. 20. Text: *D. S. B.*, Jan. 27, 1940, pp. 93-94; *N. Y. Times*, Jan. 23, 1940, p. 4.
- 15-18 GRAF VON SPEE (battleship). Government of Uruguay ordered the German pocket battleship to leave Montevideo by Dec. 17 after the ship had taken refuge from three British cruisers (*Ajax*, *Exeter* and *Achilles*). It protested to Great Britain and Germany for having permitted a naval battle inside the 3-mile limit. *N. Y. Times*, Dec. 17, 1939, p. 1. The captain, before ordering the scuttling of the ship, protested against being compelled to leave without adequate time for repairs. Text of protest: *N. Y. Times*, Dec. 18, 1939, p. 2. The Uruguayan communiqué of Dec. 18 rejected the complaint. Text: *N. Y. Times*, Dec. 19, 1939, p. 5.
- 16 BULGARIA—GERMANY. Trade agreement signed at Sofia. *B. I. N.*, Dec. 30, 1939, p. 1456.
- 17 COLOMBIA—VENEZUELA. Treaty of non-aggression, conciliation, arbitration and juridical procedure signed at Bogotá. *N. Y. Times*, Dec. 19, 1939, p. 4; *D. S. B.*, Dec. 23, 1939, p. 734.
- 17/20 CZECHOSLOVAKIA. France and Great Britain recognized Czechoslovak National Committee, formed in Paris in November, as the qualified representative of the Czechoslovak people. *B. I. N.*, Dec. 30, 1939, pp. 1455, 1470; *London Times*, Dec. 22, 1939, p. 5.

- 18/22 CUBA—UNITED STATES. Trade agreement signed Dec. 18 at Washington, supplementary to the agreement of Aug. 24, 1934, of which it will become an integral part. Proclamations exchanged on Dec. 22. Summary of provisions: *D. S. B.*, Dec. 23, 1939, pp. 729-731.
- 19 PERMANENT COURT OF ARBITRATION. Colombia appointed as members Señores Dario Echandia, Roberto Urdaneta Arbeláez, Raimundo Rivas. *D. S. B.*, Jan. 13, 1940, pp. 50-51.
- 20 EMBARGO. Moral embargo on the sale of airplanes, their parts, and equipment to nations which bomb civilian populations, was extended to plans, plants, and manufacturing rights required for the production of aviation gasoline. It was applied through notices to American oil companies and a public statement by Secretary of State Hull. Text of statement: *N. Y. Times*, Dec. 21, 1939, p. 1; *D. S. B.*, Dec. 23, 1939, p. 714.
- 21 GERMANY—ITALY. Agreement signed at Rome, supplementary to that of Oct. 21, 1939, regarding a plebiscite in the Italian Tyrol. *C. S. Monitor*, Dec. 21, 1939, p. 3. 82,542 persons of German origin living in the South Tyrol voted to remain in Italy. *B. I. N.*, Jan. 13, 1940, p. 46.
- 21 GERMANY—ROMANIA. Signed new trade agreement in Bucharest. *C. S. Monitor*, Dec. 21, 1939, p. 5; *London Times*, Dec. 22, 1939, p. 5; *N. Y. Times*, Dec. 22, 1939, p. 7; *L'Europe nouvelle*, Jan. 6, 1940, p. 24.
- 22 FRANCE—YUGOSLAVIA. Two agreements signed, adjusting trade between the two countries. One was a joint Anglo-French-Yugoslav agreement concerned mainly with Yugoslav mineral exports; the other, French loans, etc. *N. Y. Times*, Dec. 23, 1939, p. 6; *London Times*, Dec. 27, 1939, p. 5.
- 23/27 ARGENTINA—GERMANY. On Dec. 23 Argentina received the German protest against the internment of crew members of the *Admiral Graf von Spee*. *N. Y. Times*, Dec. 24, 1939, p. 4. Protest was rejected Dec. 27. *N. Y. Times*, Dec. 28, 1939, p. 8.
- 23/January 19, 1940 EUROPEAN WAR—PEACE. President Roosevelt sent a letter Dec. 23 to Pope Pius concerning peace, and received his reply of Jan. 19. Texts: *D. S. B.*, Dec. 23, 1939, pp. 711-712; Feb. 3, 1940, pp. 130-132; *N. Y. Times*, Jan. 21, 1940, p. 24.
- 23/January 25, 1940 GERMANY. Issued replies to French Yellow Book on the causes of the war. *N. Y. Times*, Dec. 24, 1939, p. 5; Jan. 26, 1940, p. 2.
- 23-February 14, 1940 DECLARATION OF PANAMA. The 21 American Republics, after consultation, sent a statement Dec. 23 to France, Great Britain and Germany concerning neutrality in American waters. Text: *D. S. B.*, Dec. 23, 1939, p. 723. Great Britain's note of Jan. 15 rejected the idea of a zone of security and reserved "belligerent rights." Text: *N. Y. Times*, Jan. 16, 1940, p. 8; *London Times*, Jan. 16, 1940, pp. 7-8. Texts of French and German replies: *N. Y. Times*, Jan. 24 and Feb. 15, 1940, pp. 6 and 3.
- 24 POPE PIUS XII. Christmas Eve address to College of Cardinals offered five bases for peace. Text: *N. Y. Times*, Dec. 25, 1939, p. 2. Summary and five points: *London Times*, Dec. 27, 1939, p. 6.
- 27 GREAT BRITAIN—SWEDEN. Signed war trade agreement in London. *N. Y. Times*, Dec. 28, 1939, p. 1; *London Times*, Dec. 28, 1939, p. 6.
- 30 BELGIAN-LUXEMBURG ECONOMIC UNION—FRANCE. Trade agreement concluded at Paris. *B. I. N.*, Jan. 13, 1940, p. 35.

- 30 CANADA—UNITED STATES. Supplementary trade agreement, signed at Washington. Proclaimed by President Roosevelt the same day, it entered into force provisionally Jan. 1, 1940. *D. S. B.*, Dec. 30, 1939, pp. 739-741.
- 30 MEXICO—UNITED STATES. Mexico paid 6th annual installment of \$500,000 in accordance with Art. II of the convention of Apr. 24, 1934, regarding the settlement of claims presented to the commission established by the Special Claims convention of Sept. 10, 1923. *D. S. B.*, Dec. 30, 1939, p. 755.
- 31 JAPAN—SOVIET RUSSIA. Japan undertook payment of final installment of debt for the Chinese Eastern Railway, and Soviet Russia renewed for one year the Kamchatka fisheries convention, by agreements signed Dec. 31, 1939. *N. Y. Times*, Jan. 2, 1940, p. 10; *London Times*, Jan. 1, 1940, p. 7.

January, 1940

- 2-February 2 MAILS SEIZURE. Announcement made of United States note to Great Britain, protesting seizure and censoring of neutral mails. Text: *D. S. B.*, Jan. 6, 1940, p. 8; *N. Y. Times*, Jan. 3, 1940, p. 10. British reply of Jan. 17 rejected protest. Text: *N. Y. Times*, Jan. 21, 1940, p. 26; *D. S. B.*, Jan. 27, 1940, pp. 91-92; *London Times*, Jan. 22, 1940, p. 5. French communiqué of Feb. 2 backed the British stand. *N. Y. Times*, Feb. 3, 1940, p. 3.
- 5 CHILE—UNITED STATES. Provisional commercial agreement, reached by exchange of notes at Santiago, Jan. 6 and Feb. 1, 1938, came into force definitively. *D. S. B.*, Feb. 17, 1940, p. 191.
- 6-15 SCANDINAVIAN STATES—SOVIET RUSSIA. Norway replied Jan. 6 and Sweden on Jan. 10 to Russian protest of their aid to Finland. *B. I. N.*, Jan. 27, 1940, pp. 124, 129; *N. Y. Times*, Jan. 15, 1940, p. 4. Russia announced its protest on Jan. 15. *N. Y. Times*, Jan. 15, 1940, p. 1. On Jan. 15 Sweden and Norway charged Russia with violating their neutrality. *N. Y. Times*, Jan. 16, 1940, p. 1.
- 7 EUROPEAN WAR. Argentina protested to Great Britain, France, Poland and Germany against the use of automatic contact mines outside territorial waters, and reserved the right to claim damages in case of Argentine life or property loss. *B. I. N.*, Jan. 13, 1940, p. 23.
- 8 ANGLO-FRENCH-TURKISH PACT. Economic and financial agreement signed at Paris. *N. Y. Times*, Jan. 9, 1940, p. 10; *London Times*, Jan. 9, 1940, p. 8. Main points: *London Times*, Feb. 7, 1940, p. 7.
- 8 AUSTRALIA—UNITED STATES. Establishment of diplomatic relations announced by United States Department of State. *N. Y. Times*, Jan. 8 and 9, 1940, pp. 4, 6; *D. S. B.*, Jan. 13, 1940, p. 49.
- 13-17 SOUTH AMERICAN RADIO CONFERENCE. Third conference met at Santiago, Chile, with representatives from ten countries. It approved resolutions for modernization of broadcasting to serve the cause of closer friendship and culture; adoption of uniform practices for the protection of authors; short-wave news transmissions. *N. Y. Times*, Jan. 18, 1940, p. 4.
- 15 CANADA—UNITED STATES. Announcement made by United States State Department that the two countries have agreed to refer three questions relating to the waters of the Souris (Mouse) River to the International Joint Commission, created by the Boundary Waters Treaty of 1909. Questions: *D. S. B.*, Jan. 20, 1940, pp. 82-83.
- 15 MEXICO—UNITED STATES. The Mexican Government contended in the New York Court of Appeals that a decision, handed down Nov. 14, 1939, authorizing an accounting of an agreement for readjustment of the Mexican national debt, violated Mexico's rights as a friendly foreign state. *N. Y. Times*, Jan. 16, 1940, p. 7.

- 15-February 3 INTER-AMERICAN NEUTRALITY COMMITTEE. Sessions were held at Rio de Janeiro. Dr. Afranio de Mello Franco was elected permanent chairman. Charles G. Fenwick is the United States delegate. President Vargas of Brazil declared in an address that the Americas have the right to proclaim a peace zone. *N. Y. Times*, Jan. 16, 1940, p. 8. The Committee adopted on Jan. 29 a resolution designed to standardize the treatment of belligerents interned by American nations. *N. Y. Times*, Jan. 30, 1940, p. 6. Recommendations of the Committee, made public on Feb. 26, included regulations governing belligerent submarines in Pan American waters, and vessels used as auxiliary transports of warships. Text of recommendations: *N. Y. Times*, Feb. 27, 1940, p. 3; this JOURNAL, Supplement, p. 75.
- 17 BULGARIA-SPAIN. Commercial agreement signed at Madrid. *B. I. N.*, Jan. 27, 1940, p. 128.
- 18 FRANCE-SPAIN. Trade treaty signed at Madrid. In force Jan. 22. *London Times*, Jan. 20, 1940, p. 5; *B. I. N.*, Jan. 27, 1940, p. 128.
- 18-23 INTER-AMERICAN RADIO CONFERENCE. Second conference held at Santiago, Chile. A program of work covering technical subjects was adopted. *N. Y. Times*, Jan. 18 and 28, 1940, pp. 4 and 24.
- 19 CUBA-DOMINICAN REPUBLIC. Ratifications exchanged at Havana of the parcel post treaty signed in 1932. *N. Y. Times*, Jan. 20, 1940, p. 4.
- 21 SLOVAKIA-YUGOSLAVIA. Yugoslavia renewed provisional trade agreement of July, 1939. *N. Y. Times*, Jan. 22, 1940, p. 4.
- 22-24 CANADA-UNITED STATES. Officials met in Washington to discuss a draft for a treaty regarding utilization of the Great Lakes-St. Lawrence Basin. Text of joint statement: *D. S. B.*, Jan. 27, 1940, pp. 124-125.
- 23 ARGENTINA-BRAZIL. Treaty of commerce and navigation signed at Buenos Aires. *N. Y. Times*, Jan. 24, 1940, p. 10.
- 25 MAILS. The United States Post Office Department issued regulations banning shipment of articles or materials by air mail or surface ships to belligerent countries except upon affidavit that the articles have been transferred to foreign ownership. *N. Y. Times*, Jan. 26, 1940, p. 1.
- 30 MEXICAN OIL. The Mexican Government rejected suggestions that oil expropriation dispute with American and foreign oil companies be referred to the Permanent Court of International Justice, claiming that no reason existed for such arbitration. *N. Y. Times*, Jan. 31, 1940, p. 7.
- 30 REFUGEES. Contract signed at Ciudad Trujillo by representatives of the Dominican Republic and the Dominican Republic Association, granting a tract of 24,000 acres for the settlement of 500 refugee families. *N. Y. Times*, Jan. 31, 1940, p. 1.
- 31 FRANCE-GREECE. Commercial agreement signed at Paris, which entered into force Feb. 5, 1940, for one year. *N. Y. Times*, Feb. 1, 1940, p. 3.
- 31 GUATEMALA-BRITISH HONDURAS. Announcement made of British proposal to Guatemala that border dispute between Guatemala and British Honduras be referred to arbitration. *N. Y. Times*, Jan. 31, 1940, p. 2.
- 31 JAPAN-SOVIET RUSSIA. Mixed commission, empowered to prevent or settle all border disputes, sitting at Harbin, voted to disband when negotiations broke down. *N. Y. Times*, Jan. 31 and Feb. 1, 1940, pp. 8 and 11.

- 31 SWITZERLAND—UNITED STATES. Supplementary extradition treaty signed at Bern, amending extradition treaty of May 14, 1900, as amended by the supplementary treaty of Jan. 10, 1935. *D. S. B.*, Feb. 3, 1940, p. 149.

February, 1940

- 2 CANADA—UNITED STATES. Charles E. Jackson named United States representative on the International Fisheries Commission which met in Washington Feb. 1 and 2. *D. S. B.*, Feb. 3, 1940, p. 145.
- 2-4 BALKAN ENTENTE. Representatives of Turkey, Greece, Rumania and Yugoslavia met at Belgrade. General review of the situation: *N. Y. Times*, Feb. 3, 1940, p. 1; *London Times*, Feb. 3, 1940, p. 6. Text of communiqué issued at close of conference: *London Times*, Feb. 5, 1940, p. 6. Summary: *N. Y. Times*, Feb. 5, 1940, pp. 1, 3.
- 3 GREAT BRITAIN—TURKEY. Trade agreement signed at London. *London Times*, Feb. 5, 1940, p. 6.
- 4 SAUDI ARABIA—UNITED STATES. First United States Minister presented credentials to King Ibn Saud. *N. Y. Times*, Feb. 6, 1940, p. 15; *D. S. B.*, Feb. 10, 1940, p. 159.
- 5 INTERNATIONAL LABOR ORGANIZATION—SOVIET RUSSIA. Governing Body of I.L.O. decided that, as Russia automatically became a member on joining the League of Nations, it had now ceased to be a member of the I.L.O. *London Times*, Feb. 6, 1940, p. 7.
- 7-8 LEAGUE OF NATIONS. Representatives of ten countries (Argentina, Australia, Belgium, Great Britain, France, Netherlands, Norway, Portugal, Switzerland and Turkey) met at The Hague to establish a "central committee for economic and social questions," as recommended by the special committee on international coöperation in economic and social affairs (S. M. Bruce, chairman) set up by the League Council in May, 1939. *London Times*, Feb. 8, 1940, p. 4; *N. Y. Times*, Feb. 8, 1940, p. 6; *C. S. Monitor*, Feb. 7, 1940, p. 1. A communiqué, issued at the close of the meeting, stated that Chairman Colijn and Secretary-General Avenol had been charged with the consideration and reporting of which countries and persons should be invited to join the new committee, which is to have 32 members eventually. *N. Y. Times*, Feb. 9, 1940, p. 3; *C. S. Monitor*, Feb. 13, 1940, p. 1.
- 12 GERMANY—SOVIET RUSSIA. Trade treaty signed at Moscow. *N. Y. Times*, Feb. 13, 1940, p. 14; *London Times*, Feb. 13, 1940, p. 6.
- 13 JAPAN—NETHERLANDS. Japan announced its abrogation of arbitration and conciliation treaty with The Netherlands signed at The Hague, April 19, 1933. *N. Y. Times*, Feb. 13, 1940, pp. 1, 16.
- 14 EUROPEAN WAR. Authorized German spokesman declared that neutral vessels going to Allied control ports will be considered unneutral and subject to torpedoing. *N. Y. Times*, Feb. 15, 1940, p. 1.

INTERNATIONAL CONVENTIONS

- AERIAL NAVIGATION. Paris, Oct. 13, 1919. Protocols of Amendment. Paris, Oct. 27, 1922, June 30, 1923, June 15, 1929, Dec. 11, 1929.
Adhesion: Paraguay. Oct. 27, 1939. *D. S. B.*, Feb. 10, 1940, p. 161.
- AIR MAIL AGREEMENT. Panama, Dec. 22, 1936.
Ratification: Brazil. Nov. 14, 1939. *D. S. B.*, Dec. 19, 1939, p. 708.

AIR MAIL AGREEMENT AND PROTOCOL. Buenos Aires, May 23, 1939.

Ratification: United States. Jan. 25, 1940.

To enter into force: July 1, 1940. *D. S. B.*, Feb. 3, 1940, p. 149.

EDUCATIONAL FILMS. Geneva, Oct. 11, 1933.

Application to: Burma. Oct. 27, 1939. *D. S. B.*, Dec. 16, 1939, p. 707.

EDUCATIONAL FILMS. Procès-verbal. Geneva, Sept. 12, 1938.

Signatures:

Australia (with Papua and Norfolk Is., New Guinea and Nauru). Dec. 14, 1939.

D. S. B., Jan. 27, 1940, p. 125.

Great Britain (with reservation) (not definitive). Oct. 21, 1939. *D. S. B.*, Dec. 23, 1939, p. 734; *L. N. O. J.*, Sept./Oct. 1939, p. 384.

GENERAL ACT FOR PACIFIC SETTLEMENT. Geneva, Sept. 26, 1928.

Suspension: Canada. Dec. 7, 1939. *D. S. B.*, Jan. 20, 1940, p. 86.

INTER-AMERICAN CULTURAL RELATIONS. Buenos Aires, Dec. 23, 1936.

Ratification: Mexico. Sept. 29, 1939. *D. S. B.*, Feb. 10, 1940, p. 161.

LEAGUE OF NATIONS COVENANT. Protocol of Amendment. Geneva, Sept. 30, 1938.

Ratification deposited: Switzerland. Oct. 21, 1939. *L. N. O. J.*, Sept./Oct. 1939, p. 384; *D. S. B.*, Dec. 16, 1939, p. 707.

MARITIME BUOYAGE. Geneva, May 13, 1936.

Adhesion deposited: Iran. Dec. 15, 1939. *D. S. B.*, Feb. 3, 1940, p. 149.

MINIMUM AGE (SEA) CONVENTION. Revision. Geneva, Oct. 24, 1936.

Ratification deposited: Iraq. Dec. 30, 1939. *D. S. B.*, Feb. 17, 1940, pp. 191-192.

MONEY ORDERS. Panama, Dec. 22, 1936.

Ratification: Brazil. Nov. 14, 1939. *D. S. B.*, Dec. 16, 1939, p. 708.

NORTH AMERICAN REGIONAL BROADCASTING. Havana, Dec. 13, 1937.

Ratification: Mexico. Feb. 15, 1940. *D. S. B.*, Feb. 17, 1940, p. 192.

NIGHT WORK IN BAKERIES. Geneva, June 8, 1925.

Ratification deposited: Sweden. Jan. 5, 1940. *D. S. B.*, Feb. 17, 1940, p. 192.

OPIMUM SMOKING. Bangkok, Nov. 27, 1931.

Application to: Burma (by Great Britain). *L. N. O. J.*, Sept./Oct. 1939, p. 383.

PARCEL POST AGREEMENT. Panama, Dec. 22, 1936.

Ratification: Brazil. Nov. 14, 1939. *D. S. B.*, Dec. 16, 1939, p. 708.

PENAL SANCTIONS (INDIGENOUS WORKERS). Geneva, June 27, 1939.

Text (English): *I. L. O. Bulletin*, Aug. 21, 1939, pp. 60-63.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.

Renewal: Greece. (5 years from Sept. 12, 1939). *L. N. O. J.*, Sept./Oct. 1939, p. 383.

Suspension: Canada. Dec. 7, 1939. *D. S. B.*, Jan. 20, 1940, p. 87.

POSTAL UNION OF THE AMERICAS AND SPAIN. Panama, Dec. 22, 1936.

Ratification: Brazil. Nov. 14, 1939. *D. S. B.*, Dec. 16, 1939, p. 708.

PUBLIC HEALTH OFFICE. Rome, Dec. 9, 1907.

Adhesion: Hungary. Nov. 17, 1939. *D. S. B.*, Jan. 6, 1940, p. 15.

RADIO COMMUNICATIONS REGULATIONS. Additional Protocol. Revision. Cairo, April 8, 1938.

Adhesions:

Greece. Jan. 1, 1940. *D. S. B.*, Jan. 27, 1940, p. 125.

Iceland. Nov. 8, 1939. *D. S. B.*, Jan. 13, 1940, p. 51.

Ratification: China. *D. S. B.*, Feb. 10, 1940, p. 162.

RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Cairo, April 8, 1938.

Adhesions:

Greece. Jan. 1, 1940. *D. S. B.*, Jan. 27, 1940, p. 125.

Iceland. Nov. 8, 1939. *D. S. B.*, Jan. 13, 1940, p. 51.

Ratifications:

Canada. *D. S. B.*, Dec. 23, 1939, p. 735.

China. *D. S. B.*, Feb. 10, 1940, p. 162.

RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Madrid, Dec. 10, 1932.

Adhesion (by note verbale): Slovak Republic (with reservations). June 14, 1939.

D. S. B., Feb. 10, 1940, p. 162.

REFUGEES FROM GERMANY. Geneva, Feb. 10, 1938.

Signature: Great Britain (definitive). *D. S. B.*, Jan. 27, 1940, p. 126.

REFUGEES FROM GERMANY. Additional Protocol. Geneva, Sept. 14, 1939.

Signatures:

Denmark. Sept. 14, 1939.

Great Britain and Northern Ireland (not definitive). Oct. 21, 1939.

Text (French and English): *L. N. O. J.*, Sept./Oct. 1939, pp. 384, 390-400.

REFUGEES FROM GERMANY. Provisional Agreement and Final Act. Geneva, July 4, 1936.

Signature: Great Britain (definitive). *D. S. B.*, Jan. 27, 1940, p. 126.

SANITARY CONVENTION. Paris, June 21, 1926. Modification. Paris, Oct. 31, 1938.

Adhesion deposited: New Zealand. Sept. 30, 1939.

Ratifications deposited:

Australia. Sept. 28, 1939.

Denmark. Nov. 15, 1939.

Sweden. Nov. 14, 1939. *D. S. B.*, Jan. 13, 1940, p. 50.

TELECOMMUNICATIONS. Madrid, Dec. 9, 1932.

Adhesion (by note verbale): Slovak Republic (with reservations). June 14, 1939.

D. S. B., Feb. 10, 1940, p. 162.

Application to: Protectorate of Bohemia and Moravia (by Germany). Sept. 7, 1939.

D. S. B., Dec. 30, 1939, p. 756.

TELEGRAPH REGULATIONS AND PROTOCOL. Madrid, Dec. 10, 1932.

Adhesion (by note verbale): Slovak Republic (with reservations). June 14, 1939.

D. S. B., Feb. 10, 1940, p. 162.

TELEGRAPH REGULATIONS AND PROTOCOL. Cairo, April 8, 1938.

Adhesions:

Greece. Jan. 1, 1940. *D. S. B.*, Jan. 27, 1940, p. 125.

Iceland. Nov. 8, 1939. *D. S. B.*, Jan. 13, 1940, p. 51.

Ratification: China. *D. S. B.*, Feb. 10, 1940, p. 162.

TELEPHONE REGULATIONS. Cairo, April 8, 1938.

Adhesions:

Greece. Jan. 1, 1940. *D. S. B.*, Jan. 27, 1940, p. 125.

Iceland. Nov. 8, 1939. *D. S. B.*, Jan. 13, 1940, p. 51.

TELEPHONE REGULATIONS AND PROTOCOL. Madrid, Dec. 10, 1932.

Adhesion (by note verbale): Slovak Republic (with reservations). June 14, 1939.

D. S. B., Feb. 10, 1940, p. 162.

UNIVERSAL POSTAL CONVENTION. Buenos Aires, May 23, 1939.

Ratification: United States. Jan. 25, 1940. *D. S. B.*, Feb. 3, 1940, p. 149.

WHITE LEAD IN PAINT. Geneva, Nov. 19, 1921.

Ratification deposited: The Netherlands. Dec. 15, 1939. *D. S. B.*, Feb. 17, 1940, p. 192.

DOROTHY R. DART

GREAT BRITAIN: VACATION COURT

IN RE NING YI-CHING AND OTHERS ¹

August 23, 1939

In Tientsin, land in China over which Great Britain had acquired a lease, and in accordance therewith exercised certain rights of administration and control, four Chinese subjects were detained on certain criminal charges. Japan, which is carrying out military operations in China, contended that the four men were answerable to them for the crimes alleged. The British authorities, being satisfied that there was *prima facie* evidence against the four men, agreed to surrender them to the District Court at Tientsin which, the applicant for the rule alleged, was controlled by the Japanese.

A summons was issued for a writ of *habeas corpus*, directed to the Foreign Secretary and to certain officials at Tientsin, to have the four Chinese brought to the High Court in England for the purpose of an inquiry into the legality of their detention.

Held, That Tientsin was foreign territory and that a writ of *habeas corpus* would not issue in respect of a foreigner detained there.

Held, also, that in the circumstances of the present case the writ would not issue to the Foreign Secretary, who was acting only in an advisory capacity.

Mr. Justice CASSELS, giving judgment, said that the evidence was that the British municipal area at Tientsin was part of a foreign country within which the King had certain jurisdiction. It had never been acquired by settlement or otherwise and had never been recognized as, nor was it, a part of the King's dominions. A British court in China had no jurisdiction to try a Chinese subject for a crime, although committed within the British municipal area. The jurisdiction of the British authorities in Tientsin was derived from treaties and also from the Foreign Jurisdiction Act, 1890. The position, as disclosed in affidavits on both sides, was that if an offender arrested in the British municipal area was neither Chinese nor British, he was handed over to the appropriate court. If a British subject, he was tried by the British Court, and if Chinese, by the Chinese District Court. It was the practice for the Municipal Council to require *prima facie* evidence that the person arrested had committed the crime alleged, and while awaiting that evidence that person would be detained by the British municipal police.

The four Chinese on whose behalf the present application was made were not British subjects, nor were they ordinarily resident in the British municipal area. The Municipal Council were at first not satisfied with the evidence against them, but, further evidence having been supplied by the Japanese, it was now proposed to hand them over to the District Court in accordance with the usage.

The case raised questions of great importance, the first of which was whether a writ could be issued to deal with the detention of a foreigner in a foreign country. It had been decided in *Ex parte Anderson* ((1861) 3 E. and E. 487) that the writ could be issued to all parts of the dominions of the Crown. In that case the writ was granted to a person in Canada, and it was in consequence of that decision that the Habeas Corpus Act, 1862, was

¹ The Times Law Reports, Vol. 56, No. 1, p. 3.

passed. The matter was then discussed in *Rex v. Earl of Crewe*, known as *Sekgome's case* (26 *The Times* L. R. 439; [1910] 2 K. B. 576). That case was not on all fours with the present case, but it was clear from the judgments in that case that the remedy of *habeas corpus* was not confined to British subjects. Lord Justice Kennedy said ([1910] 2 K. B. on p. 620): "The remedy obtainable is not confined to British subjects." It was clear, therefore, that at the present day, if any person in this country were to be detained, his detention would be subject to investigation by this process. The phrase "foreign dominions of the Crown" was also there dealt with, where it was held that it only applied to territorial dominions. Here Tientsin formed no part of his Majesty's dominions.

In *Rex v. Earl of Crewe* (*supra*) Lord Justice Kennedy cited paragraph 4 of Lord Crewe's affidavit, which was to the effect that the Bechuanaland Protectorate was a foreign country within which his Majesty had power and jurisdiction by treaty, grant, usage, sufferance or other lawful means within the meaning of the Foreign Jurisdiction Act, 1890; and that the territory of the Protectorate had never been acquired by settlement or ceded to or conquered or annexed by his Majesty, nor had his Majesty recognized it as, nor was it, part of his dominions. Lord Justice Kennedy then said: "If this be the true view, as, in my opinion, we ought to hold, and the Bechuanaland Protectorate, including Gaberones, forms no part of his Majesty's dominions, there is no authority, so far as I am aware, which would justify the issue of the writ of *habeas corpus* for which the applicant asks."

He had listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm. In Tientsin Britain had merely acquired a lease of land and had been granted by treaty the right to administer justice to its own subjects. He was compelled to hold that in the circumstances of the present case the writ could not issue. It had been said that the District Court was Japanese controlled, but according to the evidence that court was still known as the Tientsin District Court and was still carrying out its functions. It had certainly issued summonses to the four Chinese.

It was not part of his duty to review any decision which the British Court or the Municipal Council had made, but only to decide whether a *prima facie* case had been made out that the four Chinese were being illegally detained. He had listened with great care and had arrived at the conclusion that no such case had been made out.

It had further been contended that the writ could not issue to Lord Halifax because he was not in control of the prisoners but was only acting in an advisory capacity. In his view that contention was well-founded, although it did not follow that he thought that in a proper case the writ would not issue against a Secretary of State.

It was further contended that what had been done was an act of state because it was done in pursuance of a treaty. If that had been the only contention on behalf of the respondent it would not have prevailed, but it was not necessary that he should decide that matter. He would only say that it was plainly open to the court to inquire into any matter involving the construction of treaties and other acts of state.

For the other reasons mentioned he held that the writ could not issue against any of the respondents and the summons would be dismissed, with costs.

NEW YORK: COURT OF APPEALS

THOMAS W. LAMONT et al., Individually and as the International Committee of Bankers on Mexico, Plaintiffs, *v.* THE TRAVELERS INSURANCE COMPANY, NEW YORK LIFE INSURANCE COMPANY and EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, and Such Other Persons, Firms and Corporations as May Intervene in this Action as Parties Defendant, Defendants, LOUIS S. OTTENHEIMER, Appellant, and THE GOVERNMENT OF THE UNITED STATES OF MEXICO, Appearing Specially, etc., Respondent.*

November 14, 1939

Action by committee representing holders of securities issued or guaranteed by foreign government to render accounting and distribute funds received from such government—conflicting claims to funds—determination that Supreme Court has jurisdiction to pass on issues raised by pleadings in action unless it appears on trial that foreign government has interest in property involved and is necessary party to adjudication.

Appeal from an order of the Appellate Division, first department, affirming an order of Special Term, which, upon intervention and motion of the Government of the United States of Mexico, denied jurisdiction of an accounting action between the committee as plaintiff and its depositing bondholders as defendants, and dismissed the complaint and counterclaim praying for such accounting.

LEHMAN, J. The plaintiffs, constituting the "International Committee of Bankers on Mexico," have brought this action, asking that the court permit them to render an account of their proceedings, as such committee, and that the court instruct them as to the manner in which they should distribute moneys which they have received from the Government of the Mexican Republic and which they now hold. In their complaint the plaintiffs allege that the moneys have been paid to them pursuant to certain agreements, to which the Government of Mexico was a party, and that, by the terms of such agreements, "they are constituted trustees of the funds coming into the hands of the Committee pursuant to said agreements and are obligated to distribute such funds" to holders of obligations, issued or guaranteed by the Republic of Mexico, who have deposited their securities with the com-

* 24 North Eastern Reporter (2d Series), 81.

mittee, pursuant to a deposit agreement. Claiming that the committee holds the moneys, received from the Government of the United States of Mexico, only as agents and that the moneys, which the committee now holds, remain the property of the government, that government has appeared specially for the purpose of "asserting the sovereign immunity from suit of the United States of Mexico" and has moved for an order that the court refuse jurisdiction of the action. The motion was granted and an order dismissing the action was entered, and has been affirmed by the Appellate Division.

The pleadings and the affidavits filed upon the motion, show that in June, 1922, the Mexican Government was in default in the payment of interest on over \$500,000,000 of bonds, issued at various times and containing varying terms and stipulations. These various issues of bonds may, it is said, be "generally classified into three classes: a, the Secured Direct Debt; b, the Unsecured Direct Debt; and, c, the Railways Debt." A committee of foreign bankers, composed of representatives of banking firms or corporations which had distributed these issues of bonds to foreign investors, was formed for the purpose of negotiating, in behalf of the foreign bondholders who might deposit their bonds with the committee under a deposit agreement and plan prepared by the committee, an agreement with the Government of Mexico for the adjustment and liquidation of its public debt. The committee successfully negotiated a satisfactory agreement with the government whereby the government promised to pay to the committee stipulated sums, to be distributed by the committee in accordance with a schedule which was made part of the agreement. In 1925 the committee, purporting to act under authority conferred by the depositing bondholders, agreed to a modification of the earlier agreements. The government has not paid the amounts stipulated in the original or the modified agreement, but it has paid to the committee large sums of money and the committee now holds a fund of several million dollars which, concededly, it has received from the government for distribution among holders of government obligations deposited with the committee.

Conflicting claims have been made by holders of the three classes of obligations, and the Mexican Government has claimed that it is entitled to the return of the moneys it has paid. The complaint accordingly states:

... serious doubts have been raised as to whom and in what manner such funds should be distributed, it being questioned whether (a) all such funds should be distributed *pro rata* to depositors of bonds of the Secured Direct Debt, or (b) whether all such funds should be applied *pro tanto* in accordance with the schedule attached to the Deposit Agreement to depositors, or (c) whether the Mexican Government has an interest in all or part of said funds sufficient to require your plaintiffs, as such Committee, to deliver over all or part of such funds to such Government, or (d) whether distribution should be made in some other manner. In view of these circumstances, your plaintiffs, as such Committee, and as Trustees as aforesaid, feel it incumbent on

them for their protection to apply to this Court for directions as to the persons to whom and the proportions in which they should pay and turn over such funds before making any distribution or partial distribution thereof whatsoever.

Because over two hundred and seventy-five thousand individual holders of securities have deposited their securities under the deposit agreements and because, according to the complaint, "the questions which are the subject of this action are of common and general interest to all depositors of securities falling within the three general classifications of securities under the aforesaid Agreements, namely, the Secured Direct Debt, the Unsecured Direct Debt, and the Railways Debt; that the rights under the aforesaid Agreements of depositors of securities of each of said three general classifications are equal and identical within the respective classification," the plaintiff has named Travelers Insurance Company of Hartford as a party defendant, as the representative of all the holders of deposited securities hereinabove designated as the secured direct debt; has named New York Life Insurance Company as a party defendant, as the representative of all holders of deposited securities of the unsecured direct debt, and has named Equitable Life Assurance Society of the United States as the representative of all holders of securities of the railways debt. Thereafter, by stipulation of the parties and by order of the court, Louis S. Ottenheimer was permitted to intervene as a party defendant in his own behalf and in behalf of all other holders of bonds of the "Secured Direct Debt." He appeared and filed an answer in which, as a counterclaim, he asserted, in behalf of the bondholders he represented, that, under the terms of their bonds and under the terms of the agreement and plan of 1922, holders of obligations of the secured direct debt have a right to payment of defaulted interest out of the moneys held by the committee prior and superior to the rights of holders of other classes of obligations. He alone has appealed from the order dismissing both the complaint and the counterclaim which he has pleaded.

The Government of the United States of Mexico is, of course, immune from suit here. The courts of this State cannot adjudicate any controversy to which a foreign sovereign government is a necessary party unless the foreign government, as a suitor, asks our courts to enforce some right claimed by the foreign government, or, voluntarily, submits to our courts for adjudication a claim which another makes against it. In this action neither the plaintiffs nor the defendant Ottenheimer seek any relief against the Government of Mexico or redress for a wrong which they claim the Mexican Government has done. Both ask the court only to pass upon conflicting claims to a fund which is here and in which, it is said, the Mexican Government has no property right or interest. They seek an adjudication of the rights only of those who are subject to the jurisdiction of the courts in a fund which is held by the plaintiffs. The problem is, primarily, whether the Mexican Government is a necessary party, because of its claim that it owns

the fund and that none of the parties who urge conflicting claims have any legal or equitable interest in the fund, and, incidentally, whether the controversy between the parties to the action involves questions upon which the court cannot pass without invading the sovereign right of immunity of the Mexican Government.

Since the defendant Ottenheimer, alone, has appealed to this court, we are concerned only with the controversy between holders of the bonds of the secured direct debt, who are represented by him, and the other parties to the action. That controversy involves, however, as we have said, conflicting claims to the fund received by the committee and it is plain that, in an action for an accounting, an adjudication of the claims of one party requires the adjudication, also, of the claims of all the other necessary parties to the action who assert an interest in the same fund. It follows that if the order of the court below, rejecting jurisdiction of the action, is reversed, the court must resume jurisdiction of the action and determine the conflicting claims of all the necessary parties, regardless of whether such parties are appellants or respondents here. There may, of course, be some questions, which the parties seek to raise, upon which the court cannot pass without the consent of the Government of Mexico; but the court must pass upon all questions, where it has jurisdiction, if all necessary parties are before it.

It is said that, at least in part, the action for an accounting is an action *in personam*; that a judgment *in personam* is an adjudication binding only upon the parties to the action, and that the Government of Mexico, which is not a party to the action, cannot object to the court taking jurisdiction of an action and granting judgment *in personam*, binding upon the parties to the action but not upon the foreign State. The principal, if not the sole, object of the accounting action is to obtain a judgment determining the proper disposition of the fund. We decide whether the court has jurisdiction, without the presence of the Government of Mexico, to direct how that fund should be distributed before we consider whether the court might take jurisdiction to grant a judgment *in personam* upon minor related questions, even though it could not adjudicate the principal controversy.

A foreign government, like the government of a State or of the United States, cannot be called to account in the courts of this State. Redress for repudiation even of a solemn contract or for injury inflicted without any justification by a sovereign state cannot be granted by the courts without the consent of the sovereign state. For such redress a party wronged must invoke the aid of the political branches of the government (*United States v. Delaware*, 92 U. S. 520); nor may a court grant redress against an agent of the foreign state for a wrong inflicted within the territory of the foreign state with the sanction or by command of the sovereign. "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." As corollary of that principle,

there is "immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority." (*Underhill v. Hernandez*, 168 U. S. 250.) That immunity extends to property here of the foreign sovereign and no action can be maintained to take the property of a sovereign state or to subject it to judicial process. (*Stanley v. Schwably*, 147 U. S. 508.) Even an agreement by the sovereign that its property shall be applied upon a debt of the sovereign cannot be enforced in our courts against such property, for such an agreement "amounts to nothing more than an engagement of honor, binding, so far as engagements of honor can bind, the government which issues them, but are not contracts enforceable before the ordinary tribunals of the country which issued them, without the consent of the country." (*Twycross v. Dreyfus*, 36 L. T. R. 752 [1877], per Jessel, M. R. Cf. *Smith v. Weguelin*, L. R. 8 Eq. 198 [1869].)

If, as the Government of Mexico asserts, the object of this action is to enforce an agreement, made by that government, affecting its public debt or to reach moneys held by the plaintiffs as its agents, then, under these well-established principles it is plain that the action cannot be maintained in the courts of this state. The question, however, remains whether the courts must accept the assertion of the foreign state though disputed by the appellant and the other parties to the action. The appellant maintains, as we have said, that the moneys, in the hands of the committee, are held by it as trustee for the bondholders, not as agent of the government; that no party is seeking to compel the foreign government or its agents to perform any agreement of the government; and that no party is seeking redress for breach of any agreement made by the government or to apply property of that government to payment of its public debt. They maintain, on the contrary, that they seek merely to distribute, among the real owners, moneys held in trust for them.

Whether the moneys are the property of the Mexican Government and are held by the plaintiffs as its agents, or whether the moneys are held by the plaintiffs as trustees for the benefit of the depositing bondholders, depends upon the proper construction of the agreement or agreements under which the moneys were paid to the plaintiffs. Argument, certainly not without force, can be made that the moneys do not belong to the Mexican Government; but the courts below have refused to pass upon the proper construction of these agreements on the ground that they cannot pass upon the validity of the claim of a foreign government, when the government refuses to submit that claim to the arbitrament of the courts.

That leaves the parties in an anomalous situation. The Mexican Government cannot obtain the moneys without appeal to our courts and proof that the moneys belong to it; yet, under the decision we are now reviewing, the mere assertion of a claim of ownership by the Mexican Government halts the trial and determination of whether the moneys belong to the parties to

the action rather than to the Mexican Government, even though no judgment is asked against the foreign government or against any person who is shown to be agent of the government. Immunity of a government and its property from coercion by the courts includes, it is said, immunity from investigation by the courts of the government's assertion that it owns property which parties to an action assert belong to them, and which these parties assert is not in the possession of the foreign government or its agents.

In the recent case of *Ezra v. Lamont* (265 N. Y. 635) the plaintiff sought to rescind or repudiate the agreements under which the moneys had been paid to the committee by the foreign government. There, if the plaintiff successfully sustained the allegations of the complaint, the conclusion would necessarily follow that the committee may not use the moneys it has received from the Mexican Government for the purpose for which the moneys were paid to it, and upon rescission of the contracts the committee would hold the moneys not for the benefit of the depositing bondholders but for the Mexican Government. No court could by its decree order that the moneys held for that government should be put to any other use. In the case we are now considering, though the pleadings contain many allegations contained, also, in the pleadings in *Ezra v. Lamont* (*supra*), yet the pleadings contain other allegations and present other claims which, if sustained, will establish the right of the bondholders to distribution of the moneys held by the committee. There lies the distinction between the two cases.

The mere assertion by the Government of Mexico that the committee holds the moneys not as trustee for the bondholders but as agents of the government for distribution among the bondholders does not, we think, preclude the court from determining whether, under the contracts, the committee has acted and is acting solely as agent and trustee of the bondholders and not as agent of the government. In the recent case of *Compania Espanola v. The Navemar* (303 U. S. 68) the Supreme Court of the United States has discussed the question of how far a suggestion by a foreign sovereign that it is the owner of property which is the subject-matter of a suit in the courts here must be accepted as true by the court and requires the court to refuse jurisdiction of the suit. There the court held that such a suggestion, made by a foreign government to the court, constitutes merely the statement of a claim by the foreign government, and is not proof of the allegations contained therein. The right of the foreign government to demand the return of its property or to demand that the court shall recognize that the property is immune from judicial control is, then, "an appropriate subject for judicial inquiry upon proof of the matters alleged"; but the assertion of the claim gives to the foreign government only the right to intervene and prove its allegation that it owns the property. The court, in the absence of such proof, is not required to cease its consideration of the controversy between the parties to the action or to deny effect to the proof, produced by such parties, to sustain the pleaded allegations. If, in this case, the allegations of

the pleadings are sustained, that the plaintiffs hold moneys received from the Mexican Government in trust for the depositing bondholders, then the court can direct distribution of the fund without invading the sovereign immunity of the foreign government, without sitting in judgment on the acts of the government done within its own territory, and without interference with any property which belongs to the government or is in its own possession or in the possession of its agents. The foreign government does not become a necessary party to the action, unless the issues raised in the action by the *pleadings of the parties* in the action cannot be decided without the presence of the foreign government. No issue is raised merely by suggestion of a government which refuses to intervene and to present proof to sustain its allegations; and immunity from suit exists only where the object of the suit is to enforce a claim or right against the foreign government or its property. The mere assertion by a foreign government, without proof, that property which is the subject of controversy between parties here belongs to the government, does not constrain the court to refuse jurisdiction of that property.

It is true, of course, as the court pointed out in *Compania Espanola v. The Navemar* (*supra*), that a foreign government may claim immunity from suit either in the court or through diplomatic channels, and "if the claim is recognized and allowed by the executive branch of the government it is then the duty of the court to" (accept the claim of immunity) "upon appropriate suggestion of the Attorney-General or other officer acting under his direction." Here, as the United States Attorney states, he has done no more than to "present" the suggestion of immunity, "at the request of the Secretary of State of the United States, through the Attorney General, following diplomatic representations . . . made to the Secretary of State in behalf of the Government of Mexico," and the United States Attorney adds significantly: "In bringing this matter to the attention of the Court I respectfully inform it that the United States does not intervene as an interested party and that I do not appear either for the United States or for the Government of Mexico, but I present this suggestion as a matter of comity between the Government of Mexico and the United States Government for such consideration as the Court may deem necessary and proper." It seems plain that such a presentation of a "suggestion" does not indicate that the executive branch of our government has recognized and allowed the claim of the Government of Mexico, and the court remains free to give to the claim of immunity "such consideration as the court may deem necessary and proper."

We do not upon this appeal decide whether the agreements should be construed as constituting the committee the agent of the Government of Mexico for the distribution of the moneys which the committee has received and holds, or whether under the contracts the committee became the trustee of such moneys for the depositing bondholders. That is a matter which must

be decided, in the first instance, in the Supreme Court. We hold only that the Supreme Court has jurisdiction to pass upon the issues raised in the pleadings in this action and to render appropriate judgment, unless it shall appear at the trial that the Government of Mexico has, in fact, retained some right or interest in the property which is the subject of the accounting, and is a necessary party to any adjudication.

The orders should be reversed, without costs, and motion to dismiss denied.

CRANE, Ch. J., HUBBS, LOUGHRAN, FINCH and RIPPEY, JJ., concur; O'BRIEN, J., taking no part.

Orders reversed, etc.

BOOK REVIEWS AND NOTES

Académie de Droit International. Recueil des Cours, 1938. Paris: Recueil Sirey, 1938. Tomes I, pp. 717; II, pp. 644; III, pp. 705; IV, pp. 621 (Vols. 63, 64, 65, 66 of the whole series). Indexes. Fr. 120 each.

At the Academy of International Law in 1938 there were twenty lecturers upon as many different subjects. All but two of these were professors (some of them also statesmen or practitioners); a judge and the editor of a journal of international law were the others. In these sad days, it is difficult to assign nationalities, but they seem to have been distributed among thirteen states, as follows: two from Germany (Wehberg and Bilfinger); three from France (Yves de la Brière, Louis-Lucas, Chevallier); three from Italy (Reale, Baldoni, Scerni); two from England (Foster, Smith); two from Holland (François, Van Kan); and one each from Belgium (Bourquin), Greece (Dendias), Yugoslavia (Tassitch), Norway (Boye), Poland (Berezowski), Rumania (Djuvara), Spain (Sottile), and the United States (Potter). The subjects may be roughly classified as follows: two dealing with the general rules of the international law of peace; four on international organization; one on treaties; four on the fringes of the law of war; two on private international law; three on the philosophy of the law; and four others dealing with other phases of public international law.

The first lectures in these volumes are those of Hans Wehberg, and they constitute a weighty contribution to international law in its relation to civil war. While he concedes that there is no duty to recognize insurgents, he thinks that equity demands recognition at a certain stage, and that it would create a frank and open status which would make it unnecessary for diplomats to hide their necessary intercourse with insurgents. He claims that it also enables responsibility to be placed upon insurgent groups; the practical effect of this, however, may be doubted. The uncertain status of insurgents derives from the political viewpoint of national sovereignty; but insurgency has now become a matter of concern to the community of nations. Intervention is permissible when the strife becomes inhumane, if there is foreign interference, or if the struggle should endanger general peace; but the only way in which to handle civil war is through a League of Nations strong enough to protect community rights, to determine when belligerent status should be given, to intervene for mediation, etc. Dr. Wehberg makes a solid and forward-looking contribution to a developing new problem of international law.

Other lectures which, like this one, touch upon the fringes of the law of war, are upon the Modern Development of the Laws of Maritime War, by Professor H. A. Smith, of the University of London; Some Aspects of the Development of the Rules of Neutrality, by T. Boye, Judge of the Supreme Court of Norway; and Ships of War in Foreign Territorial Waters, by Profes-

sor C. Baldoni, of the University of Bologna. The purpose of maritime war, says Professor Smith, is mastery of the seas; and since war cannot be ended except on land, the purpose of maritime war is economic control. He contends that the principles of the law of neutrality, fixing a balance between the belligerent and the neutral, remain unchanged in spite of modern developments. The Declaration of Paris, he says, was made for a day when states made war and individuals made commerce, and it does not fit a day when the government takes over all property in wartime. He regards commerce as part of warmaking, and therefore subject to attack. As to contraband, a belligerent may seize anything the enemy needs, according to the old rule (?); as to visit and search, visit is a duty, but since it is impossible to search a large vessel at sea, it is legitimate to require vessels to come into port for search; as to blockade, it can now be done by military occupation of zones and mine fields; as to armed merchant vessels, they are all right. Professor Smith believes in sea power; there is little left for the neutral when he has finished. The British Government seems now to be following his recommendations, as, for example, that continuous voyage should apply to sale from an enemy to a neutral for overseas delivery to another neutral.

Mr. Boye gives a staccato summary of the historical development of some parts of the law of neutrality. It contains some interesting material, and it was given in such form as to make it easy for students to take notes upon it; but they must have found it a task. Professor Baldoni starts from the interesting proposition that territorial limits are fixed by effective occupancy of the nearby seas, and that the freedom of the high seas is an exception to this rule. This, it might be argued, would permit the American Republics to control their seas for certain purposes out to a three-hundred-mile limit; or permit Italy to control the Adriatic Sea. He rejects exterritoriality for warships, and bases their immunities upon the necessity of the performance of a public service.

Several lecturers deal with international organization. Professor Bilfinger, of Heidelberg, discusses the fundamental bases of the community of nations. He starts with the state as the recognized unit; the confusion which surrounds this term he traces back to the days of absolutism, which disregarded people and nationalism and made territorial integrity and political independence the chief characteristics of the state. It is not enough to be recognized formally as a state; there must be real foundations and effective functioning. Admission to the League of Nations, or to a non-political organization such as the Postal Union, reveals a solidarity which does not accord with the formal structure of the community of nations. Non-sovereign entities may belong to either. The trouble is that states act on a political basis; sovereignty is the criterion, and it may be destroyed by war or political action. Since the law of nations rests on the existence of sovereign states, independence must be part of the legal order; but independence must be reconciled with coöperation in the community. Since there is no super-

power, the clause *rebus sic stantibus* becomes important as the only means of reconciling static and dynamic forces; but both the League of Nations and the Stimson doctrine are static. The latter, indeed, reminds the author of the Holy Alliance at Laibach. Since justice is impossible without equality of treatment, and since this is inconsistent with efficient organization of the community of nations, there can be no international organization; and states must simply live side by side and learn their own limits through the necessity of coöperating with others. Considering how much of such learning they now display, it is a pessimistic conclusion.

Professor Dendias, of Athens, approaches international administration from a more factual basis. He thinks that there is a community independent of its members, and having something of a juridical character. But the administrative community of which he speaks is different from the community of nations acting to protect political interests, since it leaves sovereignty aside and cares for common needs. There follows a sketchy and admittedly incomplete survey and classification of existing administrative units. It may be interpolated, at this point, that such a survey is badly needed for this steadily growing and important field. Mr. Dendias would like to see all administrative units combined, not under the League of Nations because of its political character, but under a separate secretariat of its own. A more special field of international organization, the procedure of the Permanent Court of International Justice, is the subject of Professor Scerni, of Genoa. It is a technical study of the procedure of the court, having as its purpose to see how far the court is the creator of objective law.

The other topic in the field of international organization is by the man who probably wrote the first book by that title, Professor Pitman Potter, now at the University of Geneva. To him, this field is a division of the natural social sciences. In it there enters, first, geographic and ethnic factors; second, means of international exchange; third, the interaction of national foreign policies. The first form of international organization is the diplomatic and consular system, including treaty-making, with international law standing above it, and, at the top of the scale, international federation. Thus, it covers all of human life. As opposed to law, it is dynamic, where law is static. The bulk of the lectures are occupied with the history of the growth of international organization, which begins before 1815, rather than after 1920. He ends in a pessimistic strain, for even the fundamental idea in this long development seems now to be repudiated. Less than one-tenth of the nations of the world, these including the United States of America, have set the clock back. But, he believes, and rightly, it is an evolutionary process, and bound to continue.

In the field of public international law there are, aside from the final volume, three or four subjects. The Law of Asylum is the subject of Egidio Reale, formerly of Italy, who studies it from the separate viewpoints of territorial, diplomatic, and political asylum, and also as presented in the modern

problem of refugees. This last problem, in a day when passports are more insistently demanded than at any previous period of history, leads him to suggest that the law of asylum needs to be regularized, both for humanitarian reasons and to avoid international complications. The lectures of Father Yves de la Brière, who has on other occasions appeared before the Academy, give a survey of the concordats made between the Papacy and the Baltic States, the Little Entente, German countries and others, and, in more detail, the Lateran Treaty with Italy. He notes that the Papacy has recently been very active in treaty-making, with some checks, as in Germany and Yugoslavia, but on the whole with good results; and that these treaties include concepts of law which have been of surprising weight in the situation since the World War. Indeed, he concludes, there is now a concordat law in Europe.

Professor Berezowski, of the University of Warsaw, takes for his consideration the non-sovereign subjects of international law. If international law is a law between states, then states only should be subjects of that law; but this conclusion he is unwilling to accept. The non-sovereign subjects which he surveys are those of a transitory character, such as insurgent groups in so far as they are recognized, and those of permanent character, including Danzig, Vatican City, and self-governing colonies. From this survey he concludes that there are subjects of international law which are not states; he adds that individuals may be subjects.

International Terrorism is the subject of M. Sottile, editor of the *Revue de Droit International* (Genève). He defines terrorism as a criminal act, perpetrated by the use of terror or violence, in order to achieve a determinate end. It differs from other political crimes in the manner of its execution. He is interested in the problem from the viewpoint of international criminal law, to which Pella, Saldana and others have contributed. The League of Nations took up terrorism after the assassination of King Alexander and President Barthou, and offered for signature two conventions, which are analyzed by M. Sottile.

Three of the lectures may be regarded as contributions to the philosophy of international law. Maurice Bourquin, Belgian professor and statesman, talks of stability and movement in the international juridical order. The efficacy of international law, he says, depends upon the harmony between stability and movement. It is more fragile, less dense, than domestic law, and rests upon such a complex of political forces that it is correspondingly weak. This is a day of rapid change, of a psychology which puts force above morals, of lack of balance between political and economic factors. The moral forces behind the juridical order are not as strong between nations as within the state. Arbitration has developed, but does not have compulsion behind it. The League of Nations failed partly because sanctions can operate only in a universal system, partly because it was used by conquerors to maintain the *status quo*. Legislatures, courts, and private contracts allow

for change in domestic law; in international law there is only war and such methods. *Rebus sic stantibus* is not a rule, but only an idea. Political methods of change rest upon agreement rather than upon the superior command of judicial decision, and are therefore more sound. There must be amiable solutions in international affairs, but states do not make enough preparations in this direction. They need a clearing house at Geneva for major international negotiations. Professor Bourquin might rather have suggested to states that there is machinery at Geneva for this purpose, and that it should be used.

Professor Djuvara, of the University of Bucharest, gives us a clear and interesting critical presentation of various current philosophies under the title, *Foundations of Positive Juridical Order in International Law*. Among those whose views he presents are Le Fur, under natural law; Ihering, Duguit and Jèze, under objective naturalism; Kelsen, under critical positivism. Professor Djuvara denies that law requires a sanction, or that it is founded on consent. Its foundation, he concludes, resides in justice, rationally crystallized in the social fact of positivism. Perhaps he will give us a lecture later to explain just what this means.

The international juridical conscience is a matter of the more importance because of the absence of international organization. Professor Tassitch, of Belgrade, therefore, looks back over the history of internationalism, which in the Middle Ages rested upon religion and civilization, but which has been unable to keep pace with economic development. The latter has led to increasing nationalism, which is sometimes helpful and sometimes harmful. Internationalism, he thinks, will gain with the increasing recognition of the individual; democracy has already contributed the idea of the equality of man, freedom of association, and the pacific principle of majority rule. War today has lost its *raison d'être*: it cannot solve quarrels nor satisfy economic needs. He does not agree with Dr. Kunz as to "dynamic law," for he thinks that it is not favorable to peace and that it encourages disregard for accepted obligations. Peace and justice are not the same; they are two factors of solidarity.

Two lectures deal with private international law. Pierre Louis-Lucas, Dean of the Faculty of Law at Dijon, is concerned with the problem of the conflict of nationalities. He discloses the sources of such conflicts and investigates the possibility of their solution in the internationalization of law and of jurisdiction. He regards as the better approach the unification of domestic law, since states cling to the right of making their own decisions upon nationality as a part of sovereignty. In such a unification, he would prefer the *ius sanguinis* to the *ius soli*. Professor Foster, of the University of Oxford, takes as his subject, *English Theories as to International Private Law*, and seems to conclude that there are no such theories. Since the principle of comity has been discredited in England, and since Professor Arminjon has defeated the theory of acquired rights, the English judge prefers to

apply the law which suits the situation of the parties, rather than a law dictated by any preconceived doctrine. It is a confused period, so far as England is concerned, for the professors and the practitioners do not agree, and the judges do not enunciate any general principles. He takes up domicile, persons, problems arising from current political problems (*e.g.*, *de facto* governments), state immunity, public order (under which some interesting questions are raised), and finally international criminal law—to which, it may be noted, an increasing amount of attention is being paid.

The last volume contains two long lectures on the general principles of the law of peace, both by Dutch professors. They cover too wide a field to be handled in this review; indeed, they raise a question as to the value of such assignments. They offer to a lecturer the opportunity to present scattered thoughts on various subjects; they could serve to tie together various subjects and principles. Professor J. P. A. François, of Rotterdam, who also serves in the Dutch Foreign Office, weaves off and on the main road, sometimes making interesting contributions, sometimes omitting what would seem to be essential. Under domain, for example, one would expect to hear something as to modern developments concerning title by conquest; on the other hand, it was hardly worth the time to include the few cursory remarks regarding Executive Power. He concludes, in pessimistic vein, that the world has learned nothing. Professor Van Kan, formerly of Leyden, traces the law of peace under three headings: Universalism, represented by the Roman Empire; Internationalism, represented by the mediaeval Church; and Supranationalism, represented by the Holy Roman Empire. A final chapter is headed The Epoch of Modern History, but it reaches no further than Bentham. His lectures, in fact, are a historical treatment of theories of peace. He concludes that the foundations of the past remain unchanged, and that these three forces continue today, though in conflict.

CLYDE EAGLETON

Handbook of International Law. By George Grafton Wilson. 3d ed. (Hornbook Series.) St. Paul: West Publishing Co., 1939. pp. xxiv, 623. Index. \$5.00.

In the preface to the first edition of his *Handbook*, Professor Wilson observed that "The calling of the Peace Conference which assembled at The Hague in 1899 marked an epoch in International Law." This was in 1910. In the preface to the present edition, published a few weeks before the outbreak of the Second World War, Professor Wilson writes:

Some writers have raised questions as to or denied the existence of international law, but it may be a sufficient reply to show in the following pages that the highest courts in the world, as well as arbitral tribunals, continue to respect the principles of international law in their decisions and awards, which have been accepted by states as final.

Professor Wilson is steadfast in his faith, and neither the first World War nor the prospect of the second have shaken his conviction that there is a reign of law in the relations existing between states. That such relations are governed even in war-time is a part of his credo, and actually more than one-half of the present text is dedicated to the laws of war, or as some textbook writers would have it, the so-called laws of war. Such a credo is perhaps not surprising, since the author has been professor of international law at the Naval War College since 1900. Moreover, this century has already witnessed two world wars and a number of somewhat less ambitious conflicts.

The *Handbook of International Law* is probably the clearest and most compact exposé of the law of nations for classroom use. It is, moreover, a most handy quick reference book for the practitioner, whether he be a lawyer, diplomat or government official. The general arrangement is particularly helpful. Each chapter is divided into sections, with a title in bold type under which a terse definition in heavy type of the subject-matter is given, followed by a general discussion including, if appropriate, a brief historical outline. References to cases, documents and other sources are consigned to brief footnotes.

Professor Wilson does not legislate, nor does he propound interesting theories for the creation of a new world order. It may seem to some that at this stage in the world's history this somewhat dry exposition of what are supposed to be the accepted rules of conduct between so-called civilized states is untimely and outmoded. But just as, in the Dark Ages, when Rome was but a past dream and a future ideal, diligent scholars in monasteries painstakingly copied the legal texts of a vanished civilization for the guidance of future more enlightened generations, so Professor Wilson has performed a useful task in preserving what to his best knowledge and belief are the accepted rules of conduct in war and peace in the international world of today. If these rules are inadequate—and to the present reviewer they most certainly appear so—Professor Wilson's clear and concise text makes their deficiency all the more apparent, and thus facilitates the task of those who some day will be in a position to substitute order for the present international anarchy in which we live.

FRANCIS COLT DE WOLF

The International Responsibility of States for Denial of Justice. By Alwyn V. Freeman. New York, London, Toronto: Longmans, Green & Co., 1939. pp. xviii, 758. Appendices, Bibliography, Table of Cases and Index. \$12.50.

This is a distinguished contribution to the literature concerning the responsibility of states. The author has faithfully and successfully analyzed and portrayed conditions that breed international responsibility. He has shown how through various instrumentalities, and among them the courts, a state may be guilty of internationally illegal conduct. He has discussed and pointed unerringly to the fact, increasingly appreciated and supported by

judicial opinion, that responsibility for such conduct on the part of a state comes into being as soon as it has been guilty of it. "Such," he declares, "is not only the path taken by the weight of recent doctrinal authority; it is directly confirmed by the arbitral decision in the *Finnish Ships* case, which squarely supports the view that international responsibility may be incurred by a state with respect to injuries to alien citizens even before any attempt has been made to exhaust local means of redress." (p. 443.) He is quite aware, however, that this fact "does not signify that a diplomatic claim forthwith arises and that interposition is then in order; for the local remedy rule requires an alien to exhaust his remedies before municipal courts no matter whether the actor was a State official or a private person." (p. 452.) Admirable indeed is his discussion of the so-called "Local Remedy" Rule (Chap. XV), in the course of which he dwells at length, as he should, upon the views of Judge Bagge in the *Finnish Ships* case, pursuant to the agreement of September 30, 1932, between the Governments of Finland and Great Britain. (pp. 424-434.) There is illuminating discussion (Chap. XVI) of the character of attempts to restrain diplomatic interposition that have been made by Latin America. The matter of the international standard both of substantive justice and of procedural justice (Chaps. XVII and XVIII) is competently handled.

Less impressive, however, is the attempt of the author to segregate within a definitely limited field cases which he regards as constituting instances of "denial of justice"; and it is perhaps to be regretted that, according to the title of his book, the chief task to which he has dedicated his labors is that of pointing to international responsibility in cases that are, in his judgment, properly to be so labeled. If, as the author himself declares at the outset of his work (p. 2), "there is an absence of substantial agreement on the terminological significance to be given to the phrase 'denial of justice' itself, as well as a pronounced conflict in the authorities on the precise ends which the concept is meant to serve," there is solid reason to doubt the usefulness of the term in the literature of international law. Intimations that it should be applied solely to situations within a particular category, such as those growing out of improper conduct on the part of agencies locally entrusted with the task of administering justice, constitute a preachment rather than a necessary deduction from relevant and authoritative materials. Moreover, the absence of agreement as to the significance of the phrase greatly detracts from its value as a means of determining whether particular forms of state conduct, by whomsoever committed, are productive of international responsibility.¹ That is the problem which in fact constantly confronts the legal

¹ As Mr. Oliver J. Lissitzyn pointed out in 1936: "The foregoing examination of the meanings attached to the term 'denial of justice' by writers and of its use in diplomatic practice and in international adjudications clearly shows that no agreement, or even predominance of opinion, exists on this question. This conclusion may be surprising at first sight, in view of the widespread use of the term. It is believed, however, that this condition is due to the

advisers of Foreign Offices. They are not concerned with the character of the label that may well be applied to acts within a particular field and which happen to be among those that produce international responsibility; and they are at all times fearful lest the stamping of certain acts with a sinister label may somehow inspire the contention that those which escape the label are not to be construed as internationally illegal. When the author admits that "there is no doubt that the rules governing State responsibility for judicial misconduct can be framed without resorting to the term at all" (p. 180), he ruins the value of his plea that it be retained in the nomenclature of international law. That law today suffers grievously from various attempts to portray what it ordains through equivocal phrases that themselves demand explanation. "Denial of justice" is one of them.

Dr. Freeman has gone far beyond his technical objective pertaining to the matter of denial of justice, and has given such an admirable exposition of the general law concerning the international responsibility of states that he has not lessened the value of his major achievement by purporting to minimize the scope of his undertaking through the caption of his book. His competence and faithfulness have combined to give his readers the fruits of a study that is of highest merit.

CHARLES CHENEY HYDE

Law, the State, and the International Community. By James Brown Scott. Vol. I: *A Commentary on the Development of Legal, Political, and International Ideals*; Vol. II: *Extracts Illustrating the Growth of Theories and Principles of Jurisprudence, Government, and The Law of Nations.* New York: Columbia University Press, 1939. pp. xxiv, 613; vi, 401. Index. \$8.75.

These handsomely printed volumes might be considered as a history of certain political theories from Plato to Grotius, or as the *apologia pro vitâ sua* of the author. For forty years Dr. Scott has insisted that there is but one tolerable basis for the actions and policies of states, namely, that states are bound by the same principles of morality as those by which individuals are bound. Only by the acceptance of this principle is there any content to international justice; only by its dominance in international law is international peace possible. In the present work Dr. Scott traces this principle from Plato to the era of the modern state. Volume one is, in effect, a series of essays with this idea running through them all: the Greek background, the Christian heritage, the transition from medieval to modern thought, the era

fact that the determination of particular controversies has almost never depended upon the meaning attached to this term. In almost all cases, the real question has always been whether or not a State was responsible internationally for a particular act or omission, and not whether such an act or omission can be called denial of justice. Hence the incidental use of the term in most cases. It is interesting to note that the American and Panamanian General Claims Commission has found it possible to avoid the use of the term in its decisions." ("The Meaning of the Term Denial of Justice in International Law," this JOURNAL, Vol. 30 (1936), pp. 632, 645.)

of reform, and the beginnings of the modern age. Volume two is a chrestomathy of selections from the writers from Plato to Suárez, arranged under the several topics of jurisprudence, the state, and the law of nations. As such it will be a valuable adjunct for teaching and reference, a veritable commonplace book of political and legal wisdom.

A work like this could not have been written by anyone who had not read long, deeply, and widely, nor by one who lacked faith and enthusiasm. Not the classics alone, but modern juristic literature have come within the range of his sympathetic and catholic taste. He leads us into what might be called delightful bypaths: Castiglione and Bellarmine are antidotes to Machiavelli and Filmer. But in the main the author traces the current from Plato's justice: the good life, the natural equality and reasonableness of man, and the supremacy of the moral law as the law of nature. Indeed the progress of right reason vindicates the moral law as the unshatterable foundation of international law and of the true grandeur of nations, upon which the idea of a community of nations rests, and toward which its ideal points. It will be good supplementary reading for a class in political theory; it will be an inspiration and help to all those who have, like the author, a faith in the ultimate victory of peace and justice in the world. JESSE S. REEVES

The Earth and the State. A Study of Political Geography. By Derwent Whittlesey. New York: Henry Holt & Co., 1939. pp. xviii, 618. Index. \$3.75.

The term Geo-politics has taken on some unpleasant connotations in recent years. Sometimes it has the flavor of economic determinism, more recently it represents the overheated urgings of a Haushofer. A reasonable treatment of this subject in English has long been needed, and Professor Whittlesey has met it in a work that is neither Marxist nor Nazi. After all, territory is one of the essential factors of the state, and there is every reason for the consideration of this factor as a background for the study of politics, national and international. Napoleon's dictum that the foreign policy of a state lies in its geography is emphasized during the course of every European war. That the constant factors in foreign policy are geographical is acknowledged, notwithstanding all changes in communications. Professor Whittlesey's book is most valuable in its description of the political geography of modern European states, including the Balkans. Some generalizations are not so readily accepted. The "ideal" state, he says, meaning by that geo-politically ideal (hardly a Platonic concept), should be "chunky" rather than "elongate," have its "densest population in the center," "naturally marked barrier boundaries," and "self-contained." "No state of the present day fulfills these ideals" (p. 23). One may be permitted to hope that they never will be reached.

The author goes beyond Montesquieu and Buckle in asserting that "political concepts held by any group derive from their natural environment" (p.

557). It takes something other than geographical factors to explain the expansion of Roman law from Norway to South Africa, from Quebec to Mauritius. The legal orders based upon Roman law are certainly not "images of the region in which they function." Explaining some verbal usages at which the non-geo-political reader will be nettled, a glossary is appended. It might have been longer. "Transhumant" and "commensal" are not used as one might expect.

From this volume there is much to be learned and a good deal to be questioned. How far it is to be depended upon (as geography) and how far it will be challenged (as history and politics) are questions as difficult to answer as the author's own fundamental one: namely, what after all are the relative influences of environment and the human factors in the building and carrying on of states in the modern world? The answer is not yet. J. S. REEVES

Warfare: The Relation of War to Society. By Ludwig Renn. Translated by Edward Fitzgerald. New York: Oxford University Press, 1939. pp. 276. Index. \$2.50.

The writer is a German army officer who served through the World War and then went to Spain where he managed an officers' school for the Republican army during the recent civil war. The greater part of the work is devoted to a technical study of warfare in which the author draws largely on his own experience to modify accepted doctrines derived from the study of earlier wars. He makes his views on land warfare most interesting, but, as he says himself of his section on naval warfare, it "has not been written with the same knowledge as the sections on land warfare." He states that "similarity between opponents . . . creates laws of warfare, whilst dissimilarity leads to unlimited or absolute warfare." After noting the difference in naval prize law as taught in Germany and Great Britain he remarks "International law, so-called, is national law regulating international relations." Warfare is very largely governed by the economic ability of belligerents to stand the expense of the struggle, and he believes that the advantage of victory is frequently nullified by its economic consequences. Thus Italy has been too much exhausted by her conquest of Abyssinia to exploit the raw materials which she there has at her disposal.

There is a very interesting chapter on the influence of propaganda in determining the course of wars. The writer holds that the first essential of good propaganda is that its statements of facts must be unimpeachable. Falsehood may have temporary effect, but in the end people lose confidence and then they turn to other and perhaps hostile informants. His remarks on the unfavorable effects of false propaganda issued by his own side in the Spanish war are very instructive. Incidentally, it may be noticed that his high opinion of Russian economic and military strength has not been confirmed since the outbreak of the present war, before which his book was written.

W. L. RODGERS

The Extradition of Nationals. By Robert W. Rafuse. (Illinois Studies in the Social Sciences, Vol. XXIV, No. 2.) Urbana: University of Illinois Press, 1939. pp. 163. \$1.50.

Extradition of criminals, to be tried where the crime was committed and where the evidence is most easily procured, is universally recognized as desirable in the ordinary case. To this end a large number of bipartite treaties and a few multipartite conventions have been put into effect since the last half of the eighteenth century. A number of other projects for multipartite conventions have been drafted. One, which Mr. Rafuse seems to have overlooked, is that of the Harvard Research in International Law with full comments and bibliography, drafted in 1935, and appearing as a supplement to Vol. 29 of this JOURNAL.

In the nineteenth century the Americans and the British struggled manfully for the extradition of criminals irrespective of nationality. For the most part they found the struggle too hard for them and have either excepted nationals from extradition or made their extradition discretionary. These results have been brought about by the outcropping in Europe and elsewhere of a spirit of nationalism and consequent suspicion by each nation of other systems of justice, together with the emphasis in continental Europe on personal rather than national jurisdiction of crime. These things are well described by the author in the present study, in the preparation of which he had the guidance of that ripe scholar and much loved teacher, the late James Wilford Garner. Here we find evidence of careful study and comparison. The conclusion reached by the author is that at present extradition of nationals is unusual except between the United States and members of the British Commonwealth of Nations. He finds, however, some little evidence of a tendency to increase such extradition. It will be interesting to see what effect the present war, with its resultant racial prejudices and intensified nationalism, may have upon extradition trends. CHARLES K. BURDICK

Papers and Documents Relating to the Foreign Relations of Hungary. Vol. I: 1919-1920. Collected and edited by Francis Deák and Dezso Ujvary. Budapest: Royal Hungarian Ministry for Foreign Affairs, 1939. pp. xvii, 1079.

The Hungarian Government has, with this volume, initiated a series which can be best described to American readers as comparable to *Foreign Relations of the United States*. It covers the period from the reestablishment of constitutional government after the collapse of Bela Kún's communist régime, to the end of 1920. The negotiation of the Trianon Treaty falls here, and a feature of the book is the Political Diary of the Hungarian Peace Delegation. This Diary, with other documents in the book, constitutes an historical source of first importance, supplementing the four volumes on *The Hungarian Peace Negotiations* published in 1921. Volume II of the series is already in print and will be published in a few months. Subsequent volumes

will be brought out as rapidly as possible until the gap between publication and the current diplomatic scene is reduced to ten years.

Other reviewers in other journals will no doubt be chiefly concerned with the light thrown by this volume on European diplomatic history of the post-war period. They will find interesting details of the secret Franco-Hungarian negotiations (*cf.* pp. 897-904, 907-911, for interesting glimpses behind the scenes in Paris); of the early stages of the Hungarian friendships with Italy and Poland. The period covers the dark days of the post-war invasion of Hungary by the Rumanians, and is naturally of importance to any student of subsequent diplomatic alignments in the Danubian area. It is appropriate in this JOURNAL to draw attention rather to documents dealing with international law. The reviewer's task is simplified because this volume has been prepared by those interested in international law. Writing in the month of March, 1940, one is cheered by finding in the preface by the Hungarian Foreign Minister, Count Csáky, the statement that this series of publications is inspired by a desire "to facilitate the objective study of international law and relations." One of the editors is a well-known American international lawyer—Professor Francis Deák of Columbia University. The index actually contains the heading "International Law," with thirty page references thereunder. One finds also in the index headings such as "Diplomatic Immunity," "Recognition," "Treaties—Effect of on non-signatories, Interpretation of," etc.

A student of recognition of new states will find here a neat little case study. Hungary actively sought recognition as a new state, although her representative tried to persuade the Swiss Government that Hungary was not a new state but had appeared as an independent state under the Dual Monarchy. Hungary regarded the signature of the Peace Treaty as carrying *ipso facto* recognition by the Allies, but several of the neutral states were slow to recognize—clearly on political and not on juristic grounds.

There are some discussions of the difference between political and common law offenses in regard to the extradition of Bela Kún (see especially Nos. 39 and 494). In connection with current discussions of the refusal of Norway and Sweden to permit the passage of troops to aid the Finns against the Russians, one may note that in August, 1920, the Czechs invoked their neutrality to refuse the passage across Czech territory of Hungarian troops and ammunition to aid the Poles against the Russians (Nos. 553, 555). But Rumania was willing to permit the passage of Hungarian volunteers (No. 621).

Any such collection of diplomatic records will be welcomed heartily, and the Hungarian Government is to be congratulated on taking a step which may inspire the initiation of similar series by other European states. It is noteworthy that the Hungarian publication, decided upon in 1937, was not abandoned or postponed by the outbreak of war in Europe.

The format of the book is good. For the reasons explained in the editors' foreword, a strictly chronological plan has been followed; further cross-

references in footnotes would be helpful. All Hungarian texts have been translated into French or English; texts originally in French or German are printed as they were written. The useful index is printed in both English and French. The appendices include, in addition to the Diary of the Peace Delegation, translations of important Hungarian statutes and parliamentary debates. The introductory chronology is a useful feature. The type and paper are good, but there are a number of typographical errors.

PHILIP C. JESSUP

Austria (October 1918–March 1919). Transition from Empire to Republic.

By David F. Strong. New York: Columbia University Press; London: P. S. King & Son, 1939. pp. 329. Index. \$4.00.

This study is based on the whole available literature, on the Austrian official documents, and, in addition, on the leading Austrian newspapers and magazines, and, finally, on very important manuscript material in the Hoover War Library.

After reviewing, in a first part, problems created by the World War and necessarily inherited by the Austrian Republic, the author, in a topical analysis, treats fully the liquidation of the monarchy by the Lammasch Cabinet, the establishment of the Republic, the constitutional provisions of a functional democracy. He points rightly to the basic contrast between Vienna and the Alpine provinces, and to the growing conflict between Christian Socialists and Social Democrats.

But the greater part of the work is dedicated to the analysis of the economic and financial situation, and rightly so: for the dominant problem of every Austrian Government from 1918 to 1938 was the fear of the possibility of the naked life: *primum vivere*. The author depicts the lack of food and fuel, the situation of misery and starvation of the Republic, caught between the ruthlessly prolonged hunger-blockade of the Allies, and the blockades set up by the Succession States, operating on lines of blind economic nationalism.

Always thankful, as the Austrians will be, for relief from Switzerland, Holland, the Scandinavian States and the United States, later also from Italy, England and France, it was clear that the problem of seven million highly civilized men in the heart of Europe could not be solved as a problem of charity.

And, apart from all that, the Austrian Government was never the master in its house, but depended on the Succession States and the Paris Peace Conference. And yet, the Austrian Revolution was orderly and bloodless, and Vienna was the quietest and safest spot between Paris and Vladivostok, and remained the great cultural center it has always been. For, as the author correctly states, "poor and hungry as the Viennese may have been, their cultural heritage had been maintained intact" (p. 234). It is a tragic story.

As a born Austrian, as one who lived in Vienna during the months with which the book deals, and who has given much of his life to the study of the legal and international problems for which Austria was the key, the reviewer

can state that the work under review is a painstaking, exceedingly accurate and fully understanding piece of research work. JOSEF L. KUNZ

Juridiction Internationale. By Åke Hammarskjöld. Leiden: A. W. Sijthoff, 1938. pp. 846. Fl. 25.

This volume is not a treatise on jurisdiction in international law, but is a posthumous collection of selected writings of the late Registrar and Judge of the Permanent Court of International Justice. Of thirty studies and articles reprinted in this book, twenty-nine deal with the Court—its position in the international legal community, its organization, its judges, and its jurisprudence. The articles are written in French, English, German, Swedish, or Dutch, and appeared originally in the legal periodicals of some eight countries—frequently under various pseudonyms (Michel de la Grotte, Paul de Vineuil, André Becker, A. Engelsdoerfer, Warganeus, or L. Aubain).

A number of these studies deal with the annual work of the Court and appeared in the *Revue de droit international et de législation comparée* from 1923 to 1934. These articles differ from the series published by Judge Manley O. Hudson in this JOURNAL in that they contain critical appraisals of the jurisprudence of the Court—a privilege possible to the Registrar of the Court only through the use of now one and now another of the pseudonyms listed above. Other papers here reprinted deal with many aspects of the Court and its work—the Court and the League of Nations, the Court and the development of public international law, the Court and private international law, the Court and the maintenance of peace, advisory opinions, obligatory jurisdiction, reorganization of the Statute, methods of work. Taken as a whole these studies present a broad and penetrating treatment of the Permanent Court of International Justice by one intimately associated with its origins and its development.

The volume contains also a beautiful tribute and biographical essay on Hammarskjöld by Max Huber, former President of the Permanent Court. The excellent documentation of the Court is due almost entirely to the broadly conceived and skillfully executed work of its first Registrar. Judge Huber tells of the tireless work of Hammarskjöld, his meticulous attention to detail, his unsparing devotion to his task—a devotion which undermined his health. Less than a year after his election as Judge of the Court, Hammarskjöld died at the age of 44, leaving both the Court and the cause of international justice the poorer. HERBERT W. BRIGGS

Inside the Department of State. By Bertram D. Hulen. New York and London: Whittlesey House, McGraw-Hill Book Co., 1939. pp. xiv, 328. Index. \$3.00.

The huge, ugly stone structure which used to house the Departments of State, War, and Navy, has, by dint of the pressure of international affairs, gradually been taken over entirely by the Department of State, except for an

office still occupied by General Pershing. Yet, in spite of the fact that its head is number one member of the cabinet and its position is closest to the White House both in location and in importance, the Department of State is still in the cellar position when the Congress makes its annual appropriations. Undoubtedly this situation is partly due to lack of favorable publicity tending to make the representatives of the people appreciate the value of the Department of State and the Foreign Service as our first and most important bulwark of peace.

The present volume by Bertram D. Hulén is an excellent start towards a better understanding and a more adequate appreciation of the effective work which goes on quietly in the State Department. Having served for more than a decade as the *New York Times*' representative to the Department, Mr. Hulén is in a position to speak authoritatively. The author has made no attempt to chart the course of American foreign policy; rather does he portray the methods, machinery and personnel utilized in the conduct of our foreign relations, illustrating his presentation by apt examples which have come to his attention.

Some of these incidents have never before been published, and enhance the value of the study considerably. For instance, the violation of the rule that a foreign diplomat must not discuss domestic political matters of the state to which he is accredited is illustrated by the departure in 1922 of the Italian Ambassador after an interview with Secretary Hughes concerning his expressed objections to the proposed Fordney-McCumber Tariff. The way by which the United States succeeded in getting France to accept the commission of experts to revise reparations is a vivid picture of behind-the-scenes diplomacy. The reviewer has not found anywhere a better presentation of the handling of the *Panay* incident.

As might be expected, the chapters discussing the press conference system, communications, and maintaining contact at home and abroad, are particularly valuable contributions. Although press conferences with the Department of State began with John Hay, the real contribution to a better relationship between the State Department and the press began with Secretary Hughes and has been carried on by Secretaries Stimson and Hull to the benefit of both.

The study is remarkably free from errors of fact. One might question the statement that military and naval attachés do not report on political affairs, and one might object to the customary inaccurate usage of "ratification" of treaties by the Senate in a study of this sort. It should also be noted that although Congress may have the sole power in theory to raise a legation to an embassy, it has been done by the executive without getting congressional consent on several occasions, as shown by President Wilson's action in raising the legation at Lima, Peru, to an embassy.

Mr. Hulén's volume should be an indispensable addition to the library of every student of international law and diplomacy. GRAHAM STUART

Can America Stay Neutral? By Allen W. Dulles and Hamilton Fish Armstrong. New York and London: Harper & Bros., 1939. pp. vi, 277. Index. \$2.50.

This lucid survey is an outgrowth of the volume published by the same authors in 1936 with the title *Can We Be Neutral?*, which was reviewed in this JOURNAL (Vol. XXX, 1936, pp. 344-345). Some sections of the earlier book are reproduced here, others are modified or reinforced in the light of subsequent events. The story is brought down to September, 1939, and therefore does not include an analysis of the Pittman Act of November 4, 1939, which Mr. Dulles has since discussed in a penetrating article in *Foreign Affairs* (Vol. XVIII, pp. 179-195, January, 1940). The authors disclaim any intention to deal with neutrality in its historical or legal aspects, but they do try, as they state in their introduction, "to draw the lessons from past experience as to the practicability and wisdom of attempting to legislate in advance the precise manner in which our Government must always proceed in the dual effort to keep the country at peace and guard its vital interests." Among those vital interests they do not apparently include those rights of trade and travel which generations of Americans had deemed worth defending. Nor do they explore to the full the consequences of such abandonment on our part either to ourselves, or to those European neutrals who, unlike ourselves, do not possess potent means of self-defense. Like so many of their compatriots at present, they seem less desirous of talking about our rights—which exist, for all that—than of avoiding taking a position which, if challenged, might involve our national honor and prestige.

In their summary of the so-called neutrality legislation of 1935, 1936, and 1937, they point out how unfortunate it was "that the United States should have started the precedent of linking restrictions which it sees fit to place on its own trade with its duties as a neutral." The authors favored the elimination of the arms embargo from our neutrality legislation, although they were ready to give "cash and carry" a trial. Past experience, however, as they rightly insist, indicates that "in this field the legislation of today is the headache of tomorrow." The conclusion reached is "that the only way for us to be sure of escaping entanglement in foreign wars is for there to be no wars. . . . Isolation is not a lasting and sufficient shield for American interests."

JAMES P. BAXTER, 3RD

Democracy Today and Tomorrow. By Eduard Beneš. New York: Macmillan Co., 1939. pp. xiv, 244. Appendix and index. \$3.00.

Writing between March 15th and the fateful days of late August, 1939, Dr. Beneš raises the question of the future of democracy. In order to get the matter into better perspective, he examines its historical development and its present status. Looking at the process of its growth from fourteenth-century feudalism to the present, one is able, Dr. Beneš thinks, to discover "how it is likely to develop in the future." The French Revolution opened

the way to the development of modern European democracy. In its declaration of human rights, it summed up the thought of the whole school of philosophy which for centuries had fought for "natural rights"—the "philosophy of humanity". As this philosophy was gradually embodied in institutions in the course of the nineteenth century, the "fourth estate" (the workman and the small peasant) was called into existence by the new industrialism. Today European democracy faces a great dilemma: totalitarian fascist and national socialist authoritarianism on one side, and Marxist socialism on the other. In the midst of this situation, will democracy be able to survive? Dr. Beneš pursues this inquiry through its various phases in the World War and its aftermath and is able, at the end, confidently to anticipate that the future of democracy is secure, although the present scene is wrapped in deepest gloom. Indeed, the gloomy present is thought likely to continue for many years before the new spirit of man can overcome the disintegration which now is threatening the foundations of civilization as we have known it.

Dr. Beneš' most effective contributions are his analysis of modern anti-democratic ideologies and his discussion of the future of democracy. The tenets and the meaning of fascism and national socialism are cogently set forth and the incompatibility of these ideologies and systems with the peace of the world is emphasized. Dr. Beneš feels strongly that if there had been widespread knowledge of the real ideas, objectives and methods of Nazi leaders, some terrible mistakes would have been avoided. Even before August, 1939, Dr. Beneš saw democracy and dictatorships locked in mortal combat. In the world of the future, both cannot survive, but in the long run the indomitable spirit of man will triumph over dictatorships, for these latter are damned with barbarism and moral bankruptcy. Of special importance is the discussion of "democratic politics" and the art of political leadership. The standards and qualifications prescribed for successful leadership do not allow one to hope that they can be satisfied in any existing democracies within the measurable future. But they deserve careful reading, especially by all prospective candidates for political office. Dr. Beneš' contribution is not merely a careful analysis and appraisal of trends. It is also an act of faith of a man who during the preceding few months had gone through harrowing experiences and cruel mental tortures. It should be widely read and deeply pondered.

G. BERNARD NOBLE

BRIEFER NOTICES

The Senate of the United States: Its History and Practice. By George H. Haynes. (2 vols.) (Boston: Houghton Mifflin Co.; Cambridge: The Riverside Press, 1938. pp. xiv, vi, 1118. Index. \$8.50.) Rare, indeed, are the books on American government which may be termed "definitive," but no other characterization fits *The Senate of the United States* by George H. Haynes. More than a quarter of a century of patient effort has made this an exhaustive study of both the history and the practices of the Senate.

Every activity, every function of the Senate, is covered in the same "final" manner. The very completeness of the volume is breath-taking. Of particular interest to readers of the JOURNAL is the author's treatment of those subjects germane to the unique position of the United States Senate in the conduct of foreign relations. Chapter XII, "The Senate's Part in Treaty-Making and Foreign Relations," is a monograph in itself—152 pages. In it the author presents a detailed summary and an appraisal of the Senate's rôle. He does not reveal many startlingly new facts. Rather, he performs a useful task in bringing together in an understandable synthesis the results of numerous investigations of others. In his efforts to cover the literature dealing with his subject, the author has failed at times to work out his own conclusions, and is satisfied with the presentation of all points of view. Despite this shortcoming, the book is an invaluable addition to studies of the Senate's rôle in foreign affairs. There is no better description of the procedure of the Senate in handling treaties. There is no comparable study of the Senate Committee on Foreign Relations. The book is an invaluable guide to the literature of the subject. Finally, it is a veritable encyclopedia.

ROYDEN DANGERFIELD

Bombs Bursting in Air: The Influence of Air Power on International Relations. By George Fielding Eliot. (New York: Reynal & Hitchcock, 1939. pp. x, 173. Index. \$1.75.) This is a most instructive work. Particularly, the effect of air power upon the Monroe Doctrine deserves careful study in this country. The thought governing the conclusions of the book is that air power confers upon belligerents the hitherto unknown ability to go over and beyond the opposing lines of armies and strike directly at the sources of their strength, namely, the centers of industries and the so-called noncombatants at work in them. In the months since the book was written we have seen in practice the attack on the enemy's back country, making havoc of all existing rules of war relating to the safety of noncombatants. As between London, Paris and Berlin, Major Eliot thinks London is geographically the easiest for the enemy to reach. He regards Britain as the strength of the opposition to the expansionist Powers, and says that Hitler's policy has been to use his superior air force as a means of international blackmail; but predicts blackmail will fail after prolonged strain makes suffering nations prefer war to continued suspense. As for the security of the United States, the author believes that the width of the oceans makes this country reasonably free from the danger of serious air attack; but warns that in case of the success of any of the expansionist Powers, the Monroe Doctrine must be greatly extended and that at all costs this country must prevent any transfer of territory in the Western Hemisphere to any expansionist Power.

W. L. RODGERS

Population and Peace: A Survey of International Opinion on Claims for Relief from Population Pressure. By Fergus Chalmers Wright. (New York: Columbia University Press; Paris: International Institute of Intellectual Coöperation, 1939. pp. xvi, 373. Index. \$2.00; 7s. 6d.) Population pressure has been popularly believed to be an important cause of imperialism. The International Studies Conference of 1937 discussed the matter in connection with the subject of peaceful change, and the conclusions of experts presented to the conference are set forth by Dr. Wright in the volume under review. Perhaps the most valuable contribution in the book is the general

attack upon the notion that overpopulation exists in an easily discernible form and that it grants a moral right of conquest for relief purposes. Claims of overpopulation made on behalf of have-not nations are difficult to establish by objective tests and are sometimes only disguises for power and prestige ambitions. Thus, if a country has experienced a drop in emigration, is attempting to recall many of its previous emigrants, has little or no unemployment, and is waging a campaign for larger families, there would appear to be little righteous basis for demands for relief from overcrowding. Overpopulation does have its place, however, in the outward movement of dissatisfied countries because the belief exists, whether objectively meritorious or not, that an outlet is necessary and can be obtained by conquest. Consideration is given to remedies for overpopulation, such as birth control, emigration, foreign colonies, economic development, and internal colonization. Suggestions regarding the international organization of migrations are presented in the appendix. The book does not have the simplicity of argument of a work built around the thesis of one man. It is, however, more than a mere summary of the writings of others. Dr. Wright has skillfully woven the material into a clear treatment with admirable continuity. The volume should be of great value to students of world politics and particularly to those who are to assist in preparing whatever settlement shall be made at the end of the present conflict.

BENJAMIN H. WILLIAMS

Inflation im Völkerrecht der Nachkriegszeit. By G. A. Walz. (Berlin: Duncker & Humblot, 1939. pp. vi, 77.) In this supplement to the *Zeitschrift für Völkerrecht* (Band XXIII), G. A. Walz briefly analyzes the basis of international law prior to 1914 and then proceeds upon a more detailed examination of the international law which developed after the World War. His analysis shows a great deal of insight and clear thinking, and many of his criticisms directed at the post-war network of international agreements have a considerable amount of validity. It will of course be difficult for many to agree with his conclusions. As the title indicates, he considers the post-war international law as simply an "inflation" of certain liberal-democratic ideas used by the victor nations of 1919 permanently to entrench themselves in their positions of dominance. The author looks to a return to the system of international law prior to 1914, with the important difference, however, that *Völker*, and not states, are henceforth to be the subjects of this law.

VIRGINIA GOTT KING

The Congress of Berlin and After. By W. N. Medlicott. (London: Methuen & Co., 1938. pp. xii, 442. Index. 15s.) This monograph on the international relations of the Balkans and Near East for the period 1878-1880, is based mainly on the diplomatic correspondence in the archives of the Austrian and British Foreign Offices, in the Russian Embassy in London, and in various private collections. It is a scholarly book and *essentially* a scholar's book, for its meticulous attention to detail, and the very limited period that it deals with, means that one must be something of an authority upon the area and the period involved to appreciate it. It gives an account not only of the attitudes and policies of the governments of Great Britain, Austria, Russia and Turkey, the countries primarily interested, but it also gives minute descriptions of the diplomats and statesmen representing the various countries and tells of their influence upon the negotiations and upon the decisions arrived at. In a sense, it all seems very irrelevant and unim-

portant in 1940, and almost as distant in time as the Roman invasion of Britain. But as a record of human conduct and human relations it is of enduring value, and it has its lessons, for those who are interested, even in the year 1940. Certain sections of the book, particularly those describing the personnel of the Congress and the Congress itself, make interesting reading, but there is such a wealth of detail, and so many characters appear, that it is difficult for the ordinary reader to sustain his interest in it. It contains three useful maps, but another general one of the whole Balkan-Near Eastern area would have been valuable. Altogether, Mr. Medlicott is to be congratulated on this contribution to our knowledge of an important and complicated period in international relations. NORMAN MACKENZIE

The Far East in World Politics. By G. F. Hudson. 2d ed. rev. (New York: Oxford University Press; London: Humphrey Milford, 1939. pp. x, 282. Index. \$3.00.) Mr. Hudson, a Fellow of All Souls College, Oxford, has rewritten only the concluding chapter of his brief history, which appeared originally in 1937. The author describes it as "an attempt to provide a short historical introduction to the present international situation in the Far East." Intentionally, he has limited consideration of domestic affairs to such as bear directly on international relations. In time, he has confined the history to the last hundred years and he has written with a concern for interpretation and reinterpretation which preserves the work from the humdrum of a factual chronicle. Both as a stimulating review for the student of the field, and as an interesting, smoothly written summary for the general reader, this little book has found a well-deserved place. The reviewer would question the author's divorce of the older bureaucracy of China from the propertied and moneyed classes, his omission of reference to agrarian discontent in the nineteenth century, his confidence that "if Russia had conceded an exclusive control of Korea to Japan she would have met with no opposition to the accomplishment of her own far more extensive ambitions in China" (p. 141), his statements that "the Russo-Japanese sphere-delimiting agreements [1907-1916] . . . embraced . . . Sinkiang" (p. 159), and that up to the Washington Conference, England "steadily opposed moves made by . . . Japan to obtain paramountcy over China" (p. 248). But these are views of controversial issues which lend color to a reliable, unbiased, well-balanced account. HAROLD S. QUIGLEY

France. By Wladimir D'Ormesson. Translated by J. Lewis May. (*Ambassadors at Large Series.* New York, London, Toronto: Longmans, Green & Co., 1939. pp. xviii, 228. \$2.00.) This is an exposition of the motives, principles, and acts of France and the other European Powers in so far as they have determined the course of French foreign policy during the post-war period. The author does not hesitate to indicate the mistakes of his own country as well as those of her neighbors, but he shows throughout an unusual understanding of the regrettable prejudices, the effects of which are now costing humanity so dear. His mastery and first-hand knowledge of the whole field of European diplomacy make this readable, concise, and objective statement of the foreign policy of France a noteworthy contribution. The able translator has succeeded in eliminating any telltale evidence to indicate that French and not English was its birthright language. ELLERY C. STOWELL

Italy. By Camillo Pellizzi. (New York, London, Toronto: Longmans, Green & Co., 1939. pp. xii, 223. 6s.) The contribution of Dr. Pellizzi, professor of Italian at London University, to the series, *Ambassadors at Large*, edited by E. H. Carr, is less pretentious than its inclusive title would indicate. It is actually nothing more than a sympathetic interpretation of Italian foreign policy which incorporates references to other aspects of Fascist doctrine and policy only as they relate to foreign affairs. The author utilizes no new sources of information, nor does he add appreciably to our knowledge of the motives underlying Fascist policy. He reveals the fact that Italy is largely concerned with maintaining world peace, so long as it is a "peace with justice," and relies heavily on the "have-not" mythology to prove his point.

H. ARTHUR STEINER

Fascist Italy. By William Ebenstein. (New York: American Book Co., 1939. pp. x, 310. Index. \$2.50.) The main outlines of the political structure and the ideology of Fascist Italy are widely known. Not so familiar are the syndical and corporative institutions by which, Fascism spokesmen tell us, the state has been transformed. The principal merit of the present book is its clear exposition of this confusing complex of organizations. "A significant criterion by which all social phenomena and political régimes are judged today . . .," the author truly states, "is their economic success or failure. It is in the domain of the hard realities which every citizen of the state encounters day after day, that no shirking, no masking of facts can avail." Judged by this criterion, the Fascist state has fallen markedly short of its claims, as Dr. Ebenstein convincingly shows, on the basis of official statistics, in chapters on "The Corporative State in Action" and "Economics and Public Finance." A discussion of Italian foreign policies, comprising about one third of the entire book, concludes Dr. Ebenstein's lucid introduction to Fascist political and economic life.

LAWRENCE PREUSS

Die deutschen Kolonien unter besondere Berücksichtigung ihrer Stellung als Mandate des Völkerbundes. By Joachim-Hans Schreiber. (Berlin and Bonn: Ferd. Dümmlers Verlag, 1939. pp. 132. Bibliography. Rm. 4.87.) The subtitle of this brief volume indicates that the author limits his study primarily to the status of the German colonies under the mandate system of the League. Taking as his major premise that the colonies were taken from Germany both in violation of the fifth of President Wilson's 14 Points and of Article XI of the Congo Act of 1885, Dr. Schreiber analyzes at length the legal position of the colonies as mandates under the League. He discusses the question of sovereignty of the mandates, rejecting the theory that it is vested in the inhabitants, the mandatory state, or the mandatory state and the League, and insists that it can only be vested in the League itself. He also discusses at some length a half-dozen methods whereby the trusteeship may be ended. Concluding with a gloomy picture of the mandates' administrative failures, Dr. Schreiber declares that the mandate system should be revised and German rights restored. The reaction of the reader is that he has read a carefully prepared brief for the return of the German colonies.

GRAHAM STUART

France and Latin-American Independence. By William Spence Robertson. (Albert Shaw Lectures on Diplomatic History. Baltimore: Johns Hopkins

Press, 1939. pp. xvi, 626. Index. \$3.75.) This is a very welcome addition to the fortunately increasing volume of books in English on the history of the Latin American countries. It deals exclusively with the important and interesting independence period. The author's somewhat crotchety diction detracts slightly from the literary quality of the book, but does not interfere with its historical value. His frequent citations of authorities in the footnotes and his carefully classified excellent bibliography, covering twenty pages, show that he has gathered information from many sources. Fourteen important archives in eight countries are named as repositories of manuscripts used. Many books, pamphlets, broadsides, newspapers, periodicals, publications of learned societies, etc., containing printed source material, have been used, as well as most of the important pertinent books, pamphlets and articles. Among the more noteworthy portions of the book are the third and fourth chapters discussing French policy toward the revolted Spanish colonies during the Napoleonic period; the eighth and ninth, regarding the French attitude toward the new states at the time intervention in Spain was under consideration and being carried out; and the fifteenth and sixteenth, regarding French recognition. The publication is essentially the writer's own production throughout; but he quotes so frequently and fully from his sources, especially manuscript, that it is also valuable as a primary source. There is also room, however, for a documentary publication of French diplomatic and other official correspondence concerning Latin American independence. Dr. Robertson is to be congratulated for having produced a book of such sterling worth, which will doubtless henceforth be considered indispensable to students who wish to acquire proficiency in the field of Latin American history, especially to those who wish to specialize in the independence period.

WILLIAM R. MANNING

La Regola del Previo Esaurimento dei Ricorsi Interni in Tema di Responsabilità Internazionale. By Roberto Ago. (Extract from *Archivio di Diritto Pubblico*, Vol. III, Fasc. 2. Padua: Casa Editrice Dott. A. Milani, 1938. pp. iv, 70.) The author, who was counsel for Italy in the Moroccan Phosphates case, after criticizing the various existing theories of the rule of exhaustion of local remedies in so far as they attempt to determine the moment when international responsibility for injuries to aliens arises, makes an attempt to erect a new one, the effect of which is that international responsibility cannot arise until local remedies have been exhausted, where such exhaustion is required before diplomatic interposition is proper. He argues that when a state is not internationally responsible, there is no right to diplomatic interposition; when a state is internationally responsible, the right to diplomatic interposition accrues at once. But in a number of situations, the author says, international law requires only a certain result, without prescribing the means by which a state may achieve that result. A state is privileged to use various means to achieve the result in such cases, and it is only after all the possible means provided by that state have been tried and have failed to achieve the result required by international law that the state becomes internationally responsible to the state of the aggrieved alien, which may then interpose immediately. The rule of exhaustion is thus merged into the substantive rule determining international responsibility. This ingenious argument is largely deductive and abstract, although near the end the author examines some cases with a view to fitting them into his theory. Some recent indications to the contrary in the decisions of inter-

national tribunals are hardly mentioned. The author's reasoning depends on tacit assumptions as to what are the "results" required by international law.

OLIVER J. LISSITZYN

Security—Can We Retrieve It? By Sir Arthur Salter. (New York: Reynal & Hitchcock, 1939. pp. xvi, 391. Index. \$3.50.) This is an attempt by a distinguished British economist and former official of the League of Nations to face the tragic situation left by the Munich surrender in 1938, and to chart some path of hope to the future. Part I portrays the depth of Germany's wounded pride, the disappearance of Britain's immunity from violent reactions from the Continent, and measures the chances of survival by France and Britain in battle. Part III reviews Britain's pitiable lack of defenses in September 1938, and analyzes the striking deficiencies of each of the government leaders which combined to produce a futilely stubborn corporate mind. Part II, "Collective Security," apportions fairly among the great democracies the responsibility for the League's failure, and defends the League against Streit's *Union Now* plan as a trial for world government which almost succeeded, and which was as far-reaching as world public opinion was prepared to support—or is yet ready to accept. Part IV offers a draft of terms for a new peace. The book is a valuable and constructive addition to the literature of the Munich period.

Another approach to the Munich debacle is to be found in *International Security*, edited by Walter H. C. Laves (Chicago: University of Chicago Press, 1939. pp. xii, 153. Index. \$2.00). This small book contains the 1939 lectures on the Harris Foundation. Three are by former President Eduard Beneš of Czechoslovakia, who bore personally the full impact of the final collapse of international security in 1938. In "The Geneva Protocol" and "The Locarno Pact" Dr. Beneš, who helped frame these historic documents, describes their meaning and importance. In his third lecture he traces the subsequent breakdown of international order to the conclusion (in July 1939) that the dictatorships and democracies "cannot live together." In "Germany and the World 1919-1939," Dr. Arthur Feiler also warns that Germany is bent upon world empire and that Nazism must be understood as an attempt at world revolution. He agrees with Salter that economic need is not the motive force of the Nazi revolt. The last lecture by Dr. Rushton Coulborn, himself an Englishman, contains a penetrating survey of the weakness and blindness of England's leaders during the past two decades which fully confirms Salter's diagnoses. The book makes clear in brief compass why there is no international security.

D. F. FLEMING

Colonial Questions and Peace. A Survey prepared under the direction of Emanuel Moresco. (New York: Columbia University Press; Paris: International Institute of Intellectual Coöperation, 1939. pp. 345. Index. \$2.00; 7s. 6d.) This timely volume, one of a series on "Peaceful Change," deals specially with colonies as they affect the economic needs of modern states; it is one of the tangible results of the work of the International Studies Conference sponsored by the International Institute of Intellectual Coöperation at Paris. Other volumes in the series deal with population, raw materials, and markets. The study is packed with useful information and data about various phases of colonial problems. It defines and classifies colonies, and shows their distribution; it examines the vital problem of the advantages and disadvantages of colonies to the mother country. Problems

relating to the settlement and the financing of colonies, questions of raw materials, food supply, and access to colonial markets are dealt with in some detail. Native labor, plantations, native production, self-government, and progress towards independence, each in turn come in for a share of attention. Five appendices carry useful special information. Perhaps the most exhaustive bibliography on colonial problems yet assembled—thirty pages of it—appears in the volume. The neatly printed study stands as a tribute to the value of scientific research on an international, coöperative scale.

The German Colonial Claim. By L. S. Amery. (London and Edinburgh: W. & R. Chambers, 1939. pp. 199. Index. 7s. 6d.) As a newspaper man sent to Germany in the 1890's, the author found "in books and pamphlets, in newspaper articles and in ordinary conversation it was always the same theme. The British Empire, sprawling over the face of the earth, much too easily won, under-peopled, under-developed, unorganised, stood in Germany's way" (p. 10). He traces the development of Germany's colonial empire and its dismemberment by the Versailles Treaty. He examines and firmly rejects all proposals of retrocession, and offers "an alternative solution," the essence of which embodies mutual economic coöperation of the British, the Germans, and other European countries. Rejecting free trade on the ground that it advantages countries with a low standard of living, he proposes the abolition of the most-favored-nation clause so that, with the return of sanity in Germany, a European economic system based on European peace may eventually "develop into a true European Commonwealth" (p. 184).

Germany's Colonial Demands. By A. L. C. Bullock. (New York: Oxford University Press; London: Humphrey Milford, 1939. pp. x, 214. \$2.75.) This small volume embodies the results of a series of study meetings attended chiefly by undergraduates along with a few senior members at Oxford University. The study is concerned with claims of the British and the Germans to the former German colonies now under British mandate. Part I deals with "The Peace Settlement and the Mandates," "Economic Arguments," and "Political Arguments." Part II contains separate chapters on South West Africa, Tanganyika, and The Cameroons. There are five appendices relating to colonies and mandates. In the concluding chapter, Professor Vincent Harlow, of the University of London, states that the Group reluctantly rejected Germany's claims and decided that the only alternative to a continuance of British mandates is "the abandonment by all concerned of the outworn conception of national sovereignty: the pooling of resources, of commercial opportunities, and moral responsibilities" (p. 214). But Germany's present extreme nationalistic claims preclude an international coöperative solution at the time being.

The Nazi Claims to Colonies. By Granville Roberts. (London: John Murray, 1939. pp. x, 116. 2s. 6d.) This little volume, with a preface by the Rt. Hon. A. Duff Cooper, flays the policies of the National Socialist Government of Germany and asserts that the leaders in Germany, by their treatment of their own people and those who have come under German control, have forfeited any rights to a return of the colonies. It is maintained that the colonies supplied such a small fraction of the raw materials and economic needs of Germany that the economic argument for retrocession falls flat. The real cause of Germany's distress is overweening national ambition, and the crushing burden of huge armaments which has dislocated German economy. Appendices carry the text of questions and answers in the House of Commons regarding the matter of colonies and the text of Mr.

Noel Baker's speech (November 21, 1938) relating to Germany's racial policy. Due allowance should be made for strong national zeal in appraising this volume.

J. EUGENE HARLEY

Through the Diplomatic Looking Glass. Immediate Origins of the War in Europe. By Oliver Benson. Norman: University of Oklahoma Press, 1939. pp. x, 239. Index. \$2.00.

From Munich to Danzig. By R. W. Seton-Watson. London: Methuen & Co., 1939. pp. xiv, 287. Index. 6s.

The British Case. By Lord Lloyd of Dolobran. New York: Macmillan Co., 1940. pp. ii, 93. 50¢.

The Case for Germany. A Study of Modern Germany. By A. P. Laurie. 4th ed. Berlin: Internationaler Verlag, 1939. pp. 179.

War in this day and age is such a grim, serious business that a nation can hardly be expected to take to the trenches unless its people are convinced they are fighting for the truth and right. The guilt of the enemy must be clearly established. The crass brutality of Machiavellian diplomacy can be justified before the people only by the assurance that great wrongs are being righted, that great ideals like justice or law and order are being obtained. In other words, the end must be built up so that it really justifies the means however brutal they may be. With this simple fact in mind, it becomes the more important to examine impartially the charges and countercharges made in time of war; to sift carefully the partisan evidence presented; to understand and appreciate both points of view. These four books constitute a part of the flood of words that are flowing from various pens concerning the underlying causes of the present war, its origins and the question of war guilt.

Undaunted by a lack of definitive documents, Dr. Benson tackles the ticklish task of presenting and interpreting the immediate origins of the present war. Few important incidents escape him as he carries the reader along with his running account of the Munich-to-Warsaw era. While somewhat sympathetic to the Allied cause, he has no axe of his own to grind. He reports events—the downfall of appeasement, the Russo-German pact, the final struggle to avert war, etc.—as he sees them, appraising and filling in the gaps between speeches, conferences and treaties in an interesting, objective way. He reaches the rather obvious conclusion that no one really wanted war. But the fact remains that in 1939 "each belligerent was confronted with the classic dilemma of international politics, acceptance of a major diplomatic defeat or resort to arms." National honor being what it is, statesmen were forced to take to the field of battle. All in all it is a worthy project and is very well done.

The British Case is briefly yet interestingly put in the little essay by Lord Lloyd (introduction by Viscount Halifax). Advances in civilization, he argues, have come largely from the Western State System with its ideals of national independence and liberty. Automatically, therefore, the present German régime, both in enslaving its own people and in attempting to stamp out freedom within the family of nations, becomes a common enemy of the world community. The author assures us that Britain is not waging this war for additional territory, protectorates, economic privilege or the Treaty of Versailles. The issue is the "issue of European freedom." Germany "wanted to dominate Europe and we are determined to prevent her." The case against Germany is here reduced to its simplest terms.

Fortified with a scathing pen and a keen knowledge of Central Europe, Professor Seton-Watson here revises and enlarges upon his successful *Munich and the Dictators*. Beginning with the Austrian crisis, the author traces the major lines of each succeeding crisis up to August, 1939—shortly before the outbreak of the war. That he is a follower of the Eden-Churchill school there can be no doubt. He regrets the resignation of Mr. Eden from the Cabinet; he deplores the sacrifice of Czechoslovakia; he cries out against "peace with honor"; he rips the Munich settlement to shreds and then insists that some things at least are worth fighting for. His severe indictment of the British Cabinet in time of stress includes a demand that British foreign policy be conducted on more democratic lines. The whole book is brilliantly written, the author's account of the Munich settlement being particularly interesting.

If at this stage of the game one is in need of a fascist antidote for Allied propaganda it may be found in generous doses in *The Case for Germany*. The reader is convinced (?) that all the saber-rattling in Europe has been done by the leftist parties of the democratic Powers and then is introduced to Germany's internal problems—labor, religion, youth, economics, agriculture, etc. Written last summer by a Scotch scientist so conservative he "cannot admire a successful soap boiler," the book apparently was designed to convince the British people that good things can come out of both Nazareth and Berchtesgaden. Herr Hitler is praised as the Prince of Peace, and a *Pax Germanica* is suggested as a cure for Europe's ills.

F. O. WILCOX

Generalized Foreign Politics. By Lewis F. Richardson. *The British Journal of Psychology*, Monograph Supplements, XXIII. (Cambridge: University Press; Chicago: University of Chicago Press, 1939. pp. viii, 91. Index. \$2.25.) This brilliant contribution to the scientific analysis of world politics will be better appreciated as the years pass—if the quest for truth continues. Dr. Richardson, a physicist by training, served two years in the World War. During his free moments he devised mathematical methods for the statement of international relationships, and circulated them in typescript in 1919. Not until 1935 did the author return to the task, and he has succeeded both in simplifying his mathematics and in buttressing his formulae by relating them to data about seven great Powers for 1922–1938. Richardson makes use of symbols for basic factors—defenses, menaces, fatigue and expense of keeping up defenses, and grievances. His equations show relationships of permanent peace by disarmament and satisfaction, and deviations from this condition. If there is mutual disarmament without satisfaction, the equations indicate that the situation is not permanent. The equations state succinctly the conditions under which a race in armament occurs. The equations are written in such a way that the system described by them is unstable. This is open to objection, however, even with the proviso that the equations are valid only for small or moderate disturbances. The ambiguity rises from failure to treat as separate variables the size of armaments and the estimation of threat. The term "menace" is very different when it is defined as a physical magnitude and as statements of expectation. It is not admissible to introduce as a postulate the point-to-point correspondence of changes in estimates of the threat value of the environment, and changes in the physical magnitude of armed forces in that environment. Such reservations do not detract from the substantial as well as the stimulative values of this monograph. Rich-

ardson's work belongs to that slender but distinguished shelf of British contributions to the science—as distinguished from the law and practice—of world politics. Though less rich in data, it is more elegantly and generally formulated than that pathbreaking study by Slavko Sećerov, *Economic Phenomena Before and After War: A Statistical Theory of Modern Wars*.

HAROLD D. LASSWELL

BOOKS RECEIVED *

- Allen, G. C. *Japanese Industry: Its Recent Development and Present Condition*. (I. P. R. Inquiry Series.) New York: International Secretariat, Institute of Pacific Relations, 1939. pp. x, 124. Index. \$1.00.
- American Philosophical Society. Proceedings, Nov. 17, 1939. *Symposium on the Totalitarian State from the Standpoints of History, Political Science, Economics and Sociology*. (Vol. 82, No. 1.) Philadelphia: American Philosophical Society, 1940. pp. ii, 102. \$.75.
- Bailey, Thomas A. *A Diplomatic History of the American People*. New York: F. S. Crofts & Co., 1940. pp. xxvi, 806. Index. \$6.00.
- Comité Français de Droit International Privé. *Travaux. Cinquième Année, 1937-1938*. Paris: Librairie Dalloz, 1939. pp. iv, 157. Fr. 30.
- Council on Foreign Relations. *Political Handbook of the World*. Parliaments, Parties and Press as of January 1, 1940. Edited by Walter H. Mallory. New York: Harper & Bros., 1940. pp. vi, 209. \$2.50.
- Deák, Francis, and Philip C. Jessup. *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries*. Edited and annotated. (2 vols.) Washington: Carnegie Endowment for International Peace; New York: Columbia University Press, 1939. pp. lxxviii, xxvi, 1615. Index. Cloth-bound, \$10.00; loose-leaf edition with service until Dec. 31, 1941, \$12.00.
- De Nova, Rodolfo. *Il Richiamo di Ordinamenti Plurilegislativi. Studio di Diritto Interlocale ed Internazionale Privato*. Pavia: Libreria Internazionale A. Garzanti, 1940. pp. ii, 188. L. 20.
- Farley, Miriam S. *The Problem of Japanese Trade Expansion in the Post-War Situation*. (I. P. R. Inquiry Series.) New York: International Secretariat, Institute of Pacific Relations, 1939. pp. x, 93. Index. \$.75.
- Foreign Relations of the United States. Papers Relating to. The Lansing Papers, 1914-1920*. (2 vols.) Washington: Government Printing Office, 1939, 1940. Vol. I: pp. lxxiv, 801. Index. \$1.50; Vol. II: pp. xlii, 576. Index. \$1.25.
- Fujii, Shinichi. *The Essentials of Japanese Constitutional Law*. Tokyo: Yuhikaku, 1940. pp. xvi, 463. Index. \$5.00.
- Grotius Society. *Transactions*. Vol. 25. Papers read before the Society in the year 1939. London: Sweet & Maxwell, 1940. pp. xxxii, 296. Index to Vols. I-XXV. 10 s.
- Huart, F. J. A. *Nederlands Aandeel in de Ontwikkeling van het Onzijdigheidsrecht gedurende den Wereldoorlog*. Leyden: E. J. Brill, 1939. pp. xxxii, 373. Index. Gld. 16.
- International Studies Conference. *University Teaching of International Relations*. A Record of the 11th Session, Prague, 1938. Edited by Sir Alfred Zimmern. New York: Columbia University Press; Paris: Institute of Intellectual Coöperation, 1939. pp. xvi, 353. Index. \$2.00.
- Interparliamentary Union. *Compte-Rendu de la XXXV^e Conférence tenue à Oslo, 15-19 août 1939*. Geneva: Librairie Payot & Cie., 1939. pp. xii, 643. Index.
- Japan Surveys the European War*. Tokyo: Tokyo Press Club, 1940. pp. iv, 88. \$1.00; 3 s.

* Mention here does not preclude a later review.

- Kelsen, Hans. *Legal Technique in International Law. A Textual Critique of the League Covenant*. New York: Columbia University Press; Geneva: Geneva Research Center, December, 1939. pp. 178. \$.40; Sw. Fr. 1.75.
- Langsam, Walter C. *The World Since 1914*. 4th ed. revised and enlarged. New York: Macmillan Co., 1940. pp. xviii, 1024. Index. \$5.00.
- League of Nations. *International Trade in Certain Raw Materials and Foodstuffs by Countries of Origin and Consumption, 1938*. New York: Columbia University Press; Geneva: League of Nations Economic Intelligence Service, 1939. pp. 178. \$1.50; 6 s.
- Lippmann, Walter. *Some Notes on War and Peace*. New York: Macmillan Co., 1940. pp. iv, 47. \$.50.
- Lundborg, Ragnar. *Pjóðartættarstada Íslands. Réttarsögulegt yfirlit og rannsókn á hinni niðverandi réttarstöðu Íslands. Frumritad á býzku*. Winnipeg: Pjóðraeknisfélag Íslendinga Vesturheimi; Viking Press, 1939. pp. 95.
- Manning, William R. (ed.) *Diplomatic Correspondence of the United States, Inter-American Affairs, 1831-1860*. Vol. XII: *Texas and Venezuela*. Docs. 5679-6174. Washington: Carnegie Endowment for International Peace, 1939. pp. xxxvi, 858. Index. \$5.00.
- Marriott, Sir John A. R. *Commonwealth or Anarchy? A Survey of Projects of Peace from the Sixteenth to the Twentieth Century*. New York: Columbia University Press; London: Oxford University Press, 1939. pp. 227. Index. \$2.00.
- Michael, Wolfgang. *The Quadruple Alliance*. England Under George I. Vol. II. Translated and adapted from the German by Annemarie MacGregor and George E. MacGregor. New York and London: Macmillan Co., 1939. pp. vi, 347. Index. \$7.00.
- Moncharville, M. *Au Fil des Ans et des Latitudes*. Paris: A. Pedone, 1939. pp. 250.
- Neutrality of the United States. Laws, Proclamations, Orders, Regulations, and Inter-American Declarations Applicable during the Present War in Europe*. Documents covering period Sept. 3-Dec. 14, 1939. Boston: World Peace Foundation, 1940. pp. iv, 68. \$.25.
- Pfankuchen, Llewellyn. *A Documentary Textbook in International Law*. New York: Farrar & Rinehart, 1940. pp. xxxiv, 1030. Index. \$6.00.
- Robbins, Lionel. *The Economic Causes of War*. London: Jonathan Cape, 1939. pp. 124. 5 s.
- Shotwell, James T., and Francis Deák. *Turkey at the Straits*. New York: Macmillan Co., 1940. pp. xiv, 196. Index. \$2.00.
- Svolos, A. *Le Travail dans les Constitutions Contemporaines*. Paris: Recueil Sirey, 1939. pp. viii, 105.
- Valladão, Haroldo. *O Ensino e o Estudo do Direito, especialmente do Direito Internacional Privado, nos Estados Unidos*. Impressões em missão universitária naquele país, pelas férias de Fevereiro-Março de 1937, sob os auspícios do Instituto Brasil-Estados Unidos. Rio de Janeiro: 1940. pp. 43.
- Van Houtte, Jean. *La Responsabilité Civile dans les Transports Aériens Intérieurs et Internationaux*. Louvain: Société d'Études Morales, Sociales et Juridiques; Paris: Librairie Générale de Droit et de Jurisprudence, 1940. pp. 224. Index. Fr. belges 60.
- Wiskemann, Elizabeth. *Prologue to War*. New York and Toronto: Oxford University Press, 1940. pp. x, 332. Index. \$3.00.
- Wood, Bryce. *Peaceful Change and the Colonial Problem*. New York: Columbia University Press; London: P. S. King & Son, 1940. pp. 166. Index. \$2.00.
- Yepes, J. M., and Pereira da Silva. *Commentaire Théorique et Pratique du Pacte de la Société des Nations et des Statuts de l'Union Panaméricaine*. Tome III (Art. 18 à 26). Paris: A. Pedone, 1939. pp. viii, 328. Fr. 50.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

AFFAIRES DANUBIENNES, December, 1939 (Vol. 1, No. 6). *La Politique Anglaise dans l'Europe du Sud-Est* (pp. 299-303), P. Einzig; *La Troisième Europe—Le Front des petits États neutres* (pp. 305-313), E. Hantos; *Les Puissances et la Nouvelle Turquie* (pp. 315-335), E. Bakirdzis.

AMERICAN BAR ASSOCIATION JOURNAL, March, 1940 (Vol. 26, No. 3). *The 300-Mile Neutral Belt in International Law* (pp. 237-238), P. S. Wild, Jr.

—, April, 1940 (Vol. 26, No. 4). *International Law Section, Spring Meeting* (pp. 338-339, 375), W. R. Vallance.

AMERICAN FOREIGN SERVICE JOURNAL, February, 1940 (Vol. 17, No. 2). *Sidelights on Past Relations Between the United States and Turkey* (pp. 61-63, 110-114), L. Heck; *American Foreign Policy and Naval Power* (pp. 68-70, 103-106), R. M. McClintock; *Eighth American Scientific Congress* (pp. 72-73, 96-97), W. H. Kelchner.

—, March, 1940 (Vol. 17, No. 3). *The Fiftieth Anniversary of the Founding of the Pan American Union* (pp. 127, 170-171), L. S. Rowe; *The Administration of the Neutrality Act* (pp. 129-132), C. W. Yost.

AMERICAN POLITICAL SCIENCE REVIEW, February, 1940 (Vol. 34, No. 1). *Safeguarding American Neutrality* (pp. 105-109), J. Simsarian.

ARBITRATION JOURNAL, January, 1940 (Vol. 4, No. 1). *The Settlement of Disputes in Pan America* (pp. 39-45), W. Sanders.

ARCHIV DES ÖFFENTLICHEN RECHTS, December, 1939 (Vol. 31, No. 2). *Der politische Begriff des Volkes* (pp. 129-153), H. Gerber; *Das Luftgebiet in Kriegszeiten* (pp. 154-185), F. Giese.

CANADIAN BAR REVIEW, February, 1940 (Vol. 18, No. 2). *Bills of Lading: Proper Law and Renvoi* (pp. 77-96), J. D. Falconbridge.

DANUBIAN REVIEW, December, 1939 (Vol. 7, No. 7). *The Political Adjustment of Carpathian Europe: British Concepts* (pp. 4-11), S. Gál.

DIRITTO MARITTIMO, June-December, 1939 (Vol. 41, Nos. 3-6). *La Legge sulla Limitazione di Responsabilità dei Proprietari di Navi e l'Opera di Francesco Berlingieri* (pp. 227-238), C. Afferni; *La nuova Legge Italiana sulla Limitazione della Responsabilità dei Proprietari di Navi* (pp. 251-297), G. B. Becchi; *Salvataggio e Assistenza in Mare* (pp. 298-345), G. Berlingieri; *Causalità specifica del Danno nel Rischio di Guerra* (pp. 356-376), A. Brunetti; *Verso l'Unificazione del Diritto del Mare* (pp. 377-381), E. Casati; *Les Règles de La Haye* (pp. 396-408), J. P. Govare; *Maritime Lien* (pp. 436-441), G. Palliccia; *Appunti sulla Cosiddetta Clausola Paramount e la Ratifica della Convenzione Internazionale di Brusselle del 25 Agosto 1924* (pp. 442-446), C. Persico; *La "Dichiarazione di Panama" e i Diritti dei Belligeranti e dei Neutrali in Mare* (pp. 447-452), R. Sandiford; *Sul Trasferimento di Navi alla Bandiera di Stati Neutrali* (pp. 453-463), M. Scerni; *L'Universalità del Diritto Marittimo Dimostrata con l'Esame delle Regole York-Anversa 1924 sull'Avaria Comune* (pp. 477-481), V. Aldo.

FOREIGN AFFAIRS, April, 1940 (Vol. 18, No. 3). *Lawless Maritime Warfare* (pp. 424-441), C. Warren; *British Policy in the Far East* (pp. 477-485), G. Samson; *The War at Sea* (pp. 546-556), H. C. Bywater.

FRIEDENS-WARTE, 1939 (Vol. 39, Nos. 5-6). *Zur Methode der Vorbereitung des Völkerbundes während des Weltkrieges* (pp. 177-202), H. Wehberg; *Die gesellschaftlichen Probleme des modernen Krieges* (pp. 213-224), S. T. Possony; *Eine Vorkämpferin des Friedens* (pp. 234-238), L. Quidde; *Die Organisation des Friedens* (pp. 240-241), H. Wehberg; *Zur Entstehungsgeschichte des Versailler Friedens* (pp. 244-246), L. Quidde.

GEORGETOWN LAW JOURNAL, December, 1939 (Vol. 28, No. 3). *The National Munitions Control Board* (pp. 375-383), G. F. Harrison.

———, January, 1940 (Vol. 28, No. 4). *The Doctrine of the Proper Law of the Contract in the English Conflict of Laws* (pp. 447-463), M. Schmitthoff.

———, March, 1940 (Vol. 28, No. 6). *The Characterization of Property in the Conflict of Laws* (pp. 739-762), A. H. Robertson.

HARVARD LAW REVIEW, February, 1940 (Vol. 53, No. 4). *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators* (pp. 554-578), M. A. Roeder.

———, March, 1940 (Vol. 53, No. 5). *C. I. F. Contracts in International Commerce* (pp. 792-826), P. W. Thayer.

INTERNATIONAL LABOR REVIEW, February, 1940 (Vol. 41, No. 2). *The Protection of Professional Titles* (pp. 115-133), M.-T. Nisot.

———, March, 1940 (Vol. 41, No. 3). *The Second Labor Conference of American States Members of the International Labor Organization* (pp. 225-268).

JOURNAL DU DROIT INTERNATIONAL, May-August, 1939 (Vol. 66, Nos. 3-4). *Le Payement en France des Obligations en Monnaie dirigée et contrôlée* (pp. 545-581), E. Silz; *L'Affaire "Radio-Tanger" et le statut international de la Zone de Tanger* (pp. 589-595), A. Prudhomme.

JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW, February, 1940 (Vol. 22, No. 1). *War Legislation in the Colonial Empire* (pp. 1-11), W. L. Dale; *Immunities of Servants of Diplomatic Agents and the Statute of Anne 7, C. 12* (pp. 19-31), J. M. Jones; *The International Labor Organization as a Subject of Study for International Lawyers* (pp. 36-56), C. W. Jenks; *India, Burma and Far Eastern Cases on the Conflict of Laws: 1935-1939* (pp. 57-73), S. V. FitzGerald.

JURIDICAL REVIEW, December, 1939 (Vol. 51, No. 4). *Extra-Territoriality* (pp. 303-322), T. Baty.

———, March, 1940 (Vol. 52, No. 1). *The Law of Domicil as Applied to Refugees* (pp. 28-37), L. Loewensohn.

KÜLTÜGYI SZEMLE (Revue des Affaires Étrangères, du Droit International et de l'Économie Mondiale), January, 1940 (Vol. 17, No. 1). *A finn kérdés* (pp. 3-9), Z. Szende; *A háború külpolitikai kihatásai* (pp. 14-19), J. Lutter; *Függetlenség, Federáció, Hegemonia* (pp. 19-24), J. Horváth; *A Radio a külpolitika szolgálatában* (pp. 24-35), G. Drucker; *Itália a Balkánon* (pp. 35-42), E. Tóttósy; *Reformok az Amerikai Egyesült Államok külügyi szervezetében* (pp. 42-49), S. Kertész; *A tengeri hadijog alapkérdései* (pp. 49-52), I. Polzovics; *Dokumentáció a külügyi igazgatásban* (pp. 52-59), I. Polgár.

———, March, 1940 (Vol. 17, No. 2). *A korszerű háború* (pp. 126-129), L. Erdeős; *A gazdasági háború és a nemzetközi jog* (pp. 129-142), I. Polzovics; *Kereskedelmi hajózás és háború* (pp. 142-148), F. Váli.

MICHIGAN LAW REVIEW, February, 1940 (Vol. 38, No. 4). *The "Minimum Standard" of the Treatment of Aliens* (pp. 445-461), E. Borchard.

———, March, 1940 (Vol. 38, No. 5). *Expatriation of American Minors* (pp. 585-609), L. B. Orfield.

NEW COMMONWEALTH QUARTERLY, December, 1939 (Vol. 5, No. 3). *An American Conception of International Organization* (pp. 183-203), J. B. Scott; *"Union" versus "League"* (pp. 204-215), G. Scelle; *Unexplored Problems of Federalism* (pp. 216-229), G. C. S. Benson; *Anglo-French Union: A Suggestion* (pp. 230-236), G. W. Keeton.

NEW YORK LAW REVIEW (formerly UNITED STATES LAW REVIEW), January, 1940 (Vol. 74, No. 1). *That Pan-American "Safety-Zone"* (pp. 53-54).

———, March, 1940 (Vol. 74, No. 3). *Aerial Bombardment in International Law* (pp. 135-141), W. M. Wherry.

NEW YORK UNIVERSITY LAW QUARTERLY REVIEW, January, 1940 (Vol. 17, No. 2). *German Confiscations of American Securities* (pp. 200-240), P. Weiden; *Constitutionality of State Legislation Affecting Aliens* (pp. 242-254).

PACIFIC AFFAIRS, March, 1940 (Vol. 13, No. 1). *Determinants of a Sino-Japanese Settlement: An Impression of the I. P. R. Study Meeting* (pp. 5-16), P. C. Jessup.

REVISTA DE LA FACULTAD DE CIENCIAS JURÍDICAS Y SOCIALES DE GUATEMALA, September-October, 1939 (Vol. 2, No. 4). *La Cuestión de Belice* (pp. 500-504); *Centroamérica y los Ingleses* (pp. 543-556), S. Aguilar.

REVUE DE DROIT INTERNATIONAL, DE SCIENCES DIPLOMATIQUES ET POLITIQUES, July-September, 1939 (Vol. 17, No. 3). *Un des Aspects de la Crise de la Société des Nations: Le Problème de l'Universalité* (pp. 171-189), R. Atabeki.

REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE, 1939 (Vol. 20, No. 3). *La Cessation des États d'après le Droit des Gens* (pp. 441-449), A. Raestad; *Essai sur le Problème de la Nullité* (pp. 450-500), W. G. Hertz; *L'Intervention pontificale dans la Délimitation des Domaines coloniaux et maritimes de la fin du XV^e au début du XVII^e Siècle* (pp. 519-528), H. Vander Linden; *Les Clauses de Révision dans les Traités internationaux multilatéraux de l'après-Guerre* (pp. 529-558), S. Engel.

—, 1939 (Vol. 20, No. 4). *La Condition envisagée par rapport au Droit international* (pp. 625-631), J. Nisot; *Le Problème de la Succession en matière d'Obligations juridiques des États* (pp. 700-707), H. Drost; *Les Clauses de Révision dans les Traités internationaux multilatéraux de l'après-Guerre* (pp. 708-747), S. Engel; *Chronique de la Jurisprudence belge en matière de Droit international privé en 1938-39* (pp. 748-764), W. van Hille; *Les Protocoles dans la Pratique de la Société des Nations* (pp. 765-771), J. G. Starke; *Les Bases d'une juste Paix* (pp. 796-799), Ch. De Visscher; *Guerre terrestre: Interdiction de l'emploi de Gaz toxiques* (pp. 803-808), O. M.; *Guerre maritime: Exercice du Droit de Visite—Déroulement et Détermination de Navires neutres* (pp. 814-820), L. N.; *Contrebande de Guerre: Le Refus de se soumettre à la Visite est-il un Fait illicite international?* (pp. 820-823), L. N.; *Séjour d'un Navire de Guerre belligérant dans un Port neutre—Incident du "Graf von Spee"* (pp. 823-830), J. Mirwart; *Admission de Prises dans un Port neutre: "The City of Flint"* (pp. 830-835), J. Mirwart; *Guerre aérienne: Le Survol du Territoire des États neutres* (pp. 835-840), A. V.

REVUE DE DROIT MARITIME COMPARÉ, July-December, 1939 (Vol. 40). *Du statut des Chartes-Parties sous l'empire de la Convention Internationale du 25 août 1924* (pp. 1-18), G. Marais; *Responsabilité de l'Incendie dans les Transports de Marchandises par Mer en l'état actuel du Droit* (pp. 19-34), G. Giraud; *Le Domaine public de la Mer* (pp. 35-56), L. Janasse; *Portée d'application des Règles d'York et d'Anvers 1924* (pp. 133-136); *La Clause "paramount" et les Conflits de Loi en matière de Connaissances* (pp. 169-182); *Un Gouvernement de fait peut-il, au sujet des Navires dont il est Propriétaire ou Possesseur, réclamer le Bénéfice des Immunités de Jurisdiction et d'Exécution?* (pp. 187-192); *A partir de quel moment l'Ordre de Réquisition d'un Navire produit-il effet, spécialement en ce qui concerne le Droit pour l'État d'invoquer, à propos de ce Navire, son Privilège d'Immunité de Jurisdiction et d'Exécution?* (pp. 256-265).

REVUE AÉRONAUTIQUE INTERNATIONALE, June, 1939 (Vol. 9, No. 2). *Régimes juridiques intéressant la Navigation aérienne au-dessus de l'Atlantique-Nord* (pp. 130-135), H. Oppikofer.

REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, July-August, 1939 (Vol. 13, No. 4). *Les Jugements nationaux "manifestement injustes" envisagés comme Source de la Responsabilité internationale des États* (pp. 373-389), C. G. Ténékidès; *Jurisprudence française en matière de Droit International Public, 1937* (pp. 390-471), Ch. Rousseau; *L'Évolution de l'Entente Balkanique* (pp. 472-496), F. N. Berkol.

—, September-October, 1939 (Vol. 13, No. 5). *Insurrection et Piraterie* (pp. 513-549), H. Lauterpacht; *La Conférence panaméricaine de Lima et les Progrès du Droit des Gens* (pp. 550-599), J.-M. Yepes; *Localités et Zones sanitaires en temps de Guerre* (pp. 600-618), G. Debeyre.

REVUE INTERNATIONALE FRANÇAISE DU DROIT DES GENS, June-September, 1939 (Vol. 8, Nos. 1-2). *La Déclaration de Lima et la Solidarité Continentale Américaine* (pp. 5-16), J.-M. Yepes; *La Banque des Règlements Internationaux et le Transfert de l'Or Tchèque* (pp. 17-25), A. Leresche; *Le Régime des Prisonniers de Guerre* (pp. 26-56), R. Meitani; *L'Extension des Règles de la Neutralité dans le Droit Maritime du Temps de Guerre* (pp. 57-64), R. Genet; *La Neutralité et les États-Unis* (pp. 65-74); *Japon-Chine: Affaires d'Amoy et de Kou-Lang-Tsou—Le Blocus de Tien-Tsin* (pp. 103-111).

RIVISTA DI DIRITTO INTERNAZIONALE, April-September, 1939 (Vol. 18, Nos. 2-3). *Sen-tenza straniera e Giudizio di Delibazione* (pp. 145-192), A. Checchini; *La Responsabilità internazionale dello Stato per Fatti di Individui* (pp. 193-261), R. Monaco; *Osservazioni sull'Intervento nel Processo Internazionale* (pp. 262-279), G. Scalfati Fusco.

———, October-December, 1939 (Vol. 18, No. 4). *Note sulla Cosa Giudicata Inter-nazionale* (pp. 361-377), G. Scalfati Fusco; *Sulla Formazione dello Stato* (pp. 378-406), G. Biscottini.

WORLD AFFAIRS INTERPRETER, January, 1940 (Vol. 10, No. 4). *Strengthening American Solidarity* (pp. 344-351), G. Stuart; *Influence of the Russo-German Pact on the Situation in Eastern Asia* (pp. 352-367), C. A. Buss; *Making Peace Possible in 1940* (pp. 377-388), A. T. Polyzoides; *Latin America and the European War* (pp. 401-407), D. W. Rowland.

ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT, October, 1939 (Vol. 9, No. 3). *Das italienische Kriegs- und Neutralitätsgesetz* (pp. 605-619), R. Sandiford; *Die Lossagung Grossbritanniens, Frankreichs, Australiens, Neuseelands, Südafrikas und Indiens von den Verpflichtungen der Fakultativklausel, Art. 36 des Statuts des Ständigen Internationalen Gerichtshofs* (pp. 620-626), Graf Moltke; *Grenzen der Schiedsgerichtsbarkeit* (pp. 627-645), V. Bruns; *Die geplante Änderung der Åland-Konvention von 1921* (pp. 646-661), Bloch; *Gesetzliche Regelung fremdenrechtlicher Fragen 1935-1938* (pp. 732-759), A. N. Makarov.

ZEITSCHRIFT FÜR VÖLKERRECHT, 1939 (Vol. 23, No. 4). *Der deutsch-dänische Nichtan-griffs- und Neutralitäts-Vertrag* (pp. 385-392), E. Brüel; *Entwicklungslinien des Völkerrechtes nach dem Weltkrieg* (pp. 393-410), F. Faluhelyi; *Zur Lehre von den Subjekten des Völkerrechts* (pp. 411-448), P. Schoen; *Die Spitzbergensche Fischereigrenze* (pp. 449-482), V. Böhmert.

ELEANOR H. FINCH

THE PRESENT STATUS OF NEUTRALITY

BY QUINCY WRIGHT
Of the Board of Editors

1. DEATH AND REVIVAL OF NEUTRALITY

(President Wilson asserted in 1917 that "neutrality is no longer feasible or desirable where the peace of the world is involved and the freedom of its people."¹ In March, 1920, at its second session, the League of Nations Council affirmed that "the conception of neutrality of the members of the League is incompatible with the principle that all members will be obliged to coöperate in enforcing respect for their engagements."² (In 1929 the British Foreign Office officially declared that "as between members of the League there can be no neutral rights because there can be no neutrals."³ And in 1932 Secretary of State Stimson declared in reference to the Pact of Paris that "hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers—violators of the general treaty. We no longer draw a circle about them and treat them with the punctilios of a duelist's code. Instead we denounce them as law-breakers."⁴)

(In spite of these announcements of its demise, the idea of neutrality was occasionally revived in treaties and legislation, even during the 1920's when the Covenant and the Pact were respected as the world's constitution.⁵ But in 1932, when Secretary Stimson, speaking for a Republican administration, was avowing the Wilsonian principle in regard to neutrality amidst rising

¹ War message, April 2, 1917. J. B. Scott (ed.), *Official Statements of War Aims and Peace Proposals*, December, 1916, to November, 1918 (Washington, 1921), p. 89.

² League of Nations Official Journal, 1920, Vol. 1, No. 2, p. 57. The resolution made a special exception to this principle in recognizing the permanent neutrality of Switzerland under the treaty of 1815.

³ Great Britain, Foreign Office, Memorandum on the Optional Clause of the Statute of the Permanent Court (Misc. No. 12, 1929, p. 10). For variations in British official attitude on this point since 1920, see Lauterpacht, "Neutrality and Collective Security," *Politica*, 1936, p. 140.

⁴ Foreign Affairs, Supplement to issue of Oct., 1932, p. iv. Other statements to similar effect are quoted by Borchard and Lage, *Neutrality for the United States* (New Haven, 1937), p. 248 ff., and by Lauterpacht, *loc. cit.* The latter concludes: "In so far as words are used with due regard to their ordinary meaning, not befogged by the deliberate artificialities of diplomatic language, it is true to say that collective security and neutrality are mutually exclusive. The more there is of one the less there is of the other." (P. 149.)

⁵ See Georg Cohn, *Neo-Neutrality* (New York, 1939), p. 62 ff.; Philip C. Jessup, *The United States and the Stabilization of Peace, A Study of Collective Security* (New York, 1935), p. 132 ff.; Harvard Research in International Law, Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, this JOURNAL, Supp., Vol. 33 (1939), p. 204 ff.

wars and rumors of war, the reincarnation of neutrality was announced in this JOURNAL.⁶ (Since then the United States has reincarnated neutrality in no less than four Acts of Congress.⁷ Jurists have reincarnated it in innumerable books and articles,⁸ and the Harvard Research in 650 pages of the Supplement to this JOURNAL.⁹ Sovereign states have reincarnated it by proclamation and protest in some, but by no means in all recent hostilities.¹⁰ The soul of neutrality, however, has been reincarnated in many bodies, so various, indeed, that some doubt whether it is the same soul.¹¹)

2. MEANINGS OF NEUTRALITY

Neutrality, in the broadest sense, means non-participation in war. But is war a duel, an instrument of policy, a disease, or a crime? (These different views of war have led respectively to reincarnations of neutrality as obligations to tolerate duelists, as practices to avoid interference with necessary processes of change, as measures to insulate a neutral from the infection of war, and as procedures to prevent and remedy dangerous resorts to violence.¹²)

The first two of these conceptions most adequately embody the essential idea of war and neutrality as it has been understood in the past century. War has implied a legal condition equally permitting two or more hostile groups to engage in conflict by armed force. The participants may each be motivated by a desire to enforce or defend its rights, or to realize or secure its policies,¹³ but unless the participants are regarded as legally equal, the event is not war.¹⁴ It is, therefore, the fact that the non-participants consider themselves neutral, that they are, at least in action, ready to be

⁶ Philip C. Jessup, "The Birth, Death and Reincarnation of Neutrality," this JOURNAL, Vol. 26 (1932), p. 789 ff.

⁷ Aug. 31, 1935, Feb. 29, 1936, May 1, 1937, Nov. 4, 1939. For texts, see Francis Deák and Philip C. Jessup, *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries* (Washington, 1939), Vol. 2, p. 1100 ff., and Deák, "The United States Neutrality Acts, Theory and Practice," *International Conciliation*, March, 1940.

⁸ See especially Borchard and Lage, *op. cit.*, and Cohn, *op. cit.*

⁹ Supplement, Vol. 33 (1939).

¹⁰ The Far Eastern and Russo-Finnish hostilities seem not to have called forth any neutrality proclamations.

¹¹ Deák points out that while these acts of the United States may "reduce the likelihood of the United States being forced or induced to abandon its neutrality," they have "only a distant and vicarious relationship to neutrality as that term is understood as the aggregate of rights and duties between belligerent and neutral states in international law." (*Loc. cit.*, p. 80). See also G. G. Wilson, this JOURNAL, Vol. 34 (1940), p. 89.

¹² Q. Wright, "The Future of Neutrality," *International Conciliation*, Sept., 1928; *The Causes of War and the Conditions of Peace* (London, 1935).

¹³ See Josef Kunz, "The Law of Nations, Static and Dynamic," this JOURNAL, Vol. 27 (1933), p. 634.

¹⁴ Grotius defined "war" as "the state of persons contending by force as such" (*De Jure Belli ac Pacis*, 1625, I, c. 2, par. 2); Bynkershoek defined it as "a contest between independent parties by way of force or deceit for the purpose of pursuing their rights" (*Quaestionum Juris Publici*, 1737, I, c. 1); and Vattel, as "that state in which we prosecute our rights by

impartial and indifferent to the results, and to abstain from assisting or hampering either, so far as that is possible without sacrificing their own vital interests—it is because of the dominance of these attitudes within the family of nations, that a violent conflict is “war” in the legal sense.¹⁵)

(If, on the other hand, the non-participants are actively concerned with the conflict and devote their policy and action either to avoiding infection and extirpating the disease,¹⁶ or to thwarting the aggressor, assisting the victim, and discouraging violence in the future,¹⁷ the word neutrality is hardly appropriate.¹⁸) Nor does the word “war” properly describe the mad violence or illegal acts which occasion such attitudes. Mob violence, revolution, rebellion, insurrection, intervention, and aggression are terms which have been utilized as alternatives.¹⁹

force” (*Le Droit des Gens*, 1758, III, c. 1, sec. 1). These imply equality in the legal position of the participants, a position emphasized by Luther when he wrote: “War against equals should be a thing that is made necessary and should be fought in the fear of God,” but coercion of inferiors by superiors is not properly war, and violence by inferiors against superiors is not “right.” (Works, Trans. C. M. Jacobs (Philadelphia, 1931), Vol. 5, pp. 62, 63, 65.) Francis Bacon emphasized the same thought when he referred to war as “the highest trial of right when princes and states shall put themselves upon the justice of God for deciding their controversies as it shall please Him to put on either side.” (1625, Works, Montague ed., Vol. 5, p. 384.) For other definitions of war, see Q. Wright, “Changes in the Conception of War,” this JOURNAL, Vol. 18 (1924), p. 762, and William Ballis, *The Legal Position of War, Changes in its Practice and Theory from Plato to Vattel* (The Hague, 1937).

¹⁵ The word “war” ordinarily refers to “war in the material sense”, i.e., the large-scale use of armed force between governments. The Prize Cases (1863), 2 Black 665; *The Three Friends* (1897), 166 U. S. 1; Wright, *loc. cit.*, p. 761. Bynkershoek was perhaps the first of the jurists to recognize clearly the modern legal conception of war as a status between “independent persons” in which there are neutrals, “who belong to neither party”, and who “must in every way guard against interfering in the war and against showing favoritism toward or prejudice against either belligerent.” (*Op. cit.*, I, c. 1, c. 9, Carnegie ed., pp. 15, 60, 61.) Luigi Sturzo recognizes the sharp distinction between the post-Renaissance conception of war and that of the Middle Ages. (*The International Community and the Right of War*, New York, 1930.) See also Ballis, *op. cit.* Jackson Ralston satirically indicates the logical development of the law of neutrality when war is treated as a duel. (*Democracy’s International Law* (Washington, 1922), p. 36.)

¹⁶ This is the attitude recommended by Cohn under the name, “neo-neutrality,” *op. cit.*, and by Senator Nye, Report of the Special Committee on Investigation of the Munitions Industry pursuant to Senate Resolution 206 (73rd Cong.), 74th Cong., 2nd Sess., Report No. 944. See Borchard and Lage, *op. cit.*, pp. 314, 315.

¹⁷ This is the attitude recommended by the League of Nations Covenant to its members. *Supra*, notes 1-4.

¹⁸ Bynkershoek excluded from the designation of neutral (*non hostes*) those favoring one side. (*Supra*, note 15.) The present writer has suggested the word “partiality” as more appropriate for such attitudes (“Neutrality and Neutral Rights following the Pact of Paris,” *Proc. Am. Soc. Int. Law*, 1930, p. 86), a word employed in the index of the U. S. Naval War College, *International Law Documents*, 1917, to describe the attitude of several of the Latin American countries after the United States entered the World War.

¹⁹ Albert E. Hindmarsh, *Force in Peace* (Cambridge, 1933); G. G. Wilson, “War Declared and the Use of Force,” *Proc. Am. Soc. Int. Law*, 1938, p. 106 ff., and discussion following, by Hindmarsh, Wright, Kunz, *et al.*

In this discussion the word "neutrality" will therefore be used only to describe the relation of non-participants toward hostilities which they view as permissible trials of right or clashes of policy between equals.²⁰ (The policy urged by Senator Nye and others of avoiding embroiling economic and other contacts with those engaged in hostilities, or by Georg Cohn of proceeding in a medical spirit to cure the mad fighters while avoiding infection, though often called neutrality or "neo-neutrality", could more properly be called war-avoidance policies.²¹) (The policies inherent in the League of Nations and urged by former Secretary Stimson of discriminating between the aggressor and the victim, though also called neutrality, or "law and order neutrality," might more properly be called law-preservation policies.²²)

3. HISTORY OF NEUTRALITY

(The law of neutrality has developed in an atmosphere of world politics dominated by the conceptions of war) and neutrality here used—an atmosphere which began to be detectable in the fifteenth century and gradually became more pervasive until it was practically ubiquitous in the late eighteenth and nineteenth centuries.²³ (States were sovereign and relied for existence primarily on their own forces and the balance of power. International law regulated certain formalities, but its scope, prestige, and reliability)

²⁰ Q. Wright, "The Future of Neutrality," *International Conciliation*, Sept., 1928, p. 353 ff.; "Neutrality and Neutral Rights following the Pact of Paris," *Proc. Am. Soc. Int. Law*, 1930, p. 85 ff.

²¹ G. G. Wilson, this *JOURNAL*, Vol. 34 (1940), p. 89, and *supra*, note 16.

²² Eugene Staley, *Raw Materials in Peace and War* (New York, 1937), p. 40, distinguishes "law and order" neutrality from "storm cellar" neutrality, and from insistence on "neutral rights." E. M. Borchard seems to have the same distinctions in mind when he refers to the "sanctionist," the "insulationist" and the "candid neutrality" schools. ("Neutrality," *Yale Law Journal*, Vol. 48 (1933), p. 46 ff.; "Sanctions vs. Neutrality," *The Hungarian Quarterly*, Vol. 1, 1936.) See also *supra*, note 17.

²³ Neutral rights at sea began to develop with the rise of commerce in the 12th and 13th centuries, but the use of the term "neutrality" in treaties did not begin until the end of the 15th century (Walker, *History of International Law*, p. 195; Nys *Le Droit international*, Vol. 2, p. 559 ff.; T. E. Holland, *Lectures on International Law* (London, 1933), p. 407; Märsden, *Law and Custom of the Sea* (Navy Record Society Publications, 49), Vol. 1, p. 149; W. S. M. Knight, "Neutrality and Neutralization in the 16th Century—Liège," *Journ. Comp. Leg.*, 3rd Ser., 1920, Vol. 2, p. 48 ff.; Jessup and Deak, *Neutrality, Its History, Economics and Law*, Vol. 1, *The Origins* (New York, 1935), pp. 4 ff., 20 ff.; Q. Wright, "The Future of Neutrality," *loc. cit.*, p. 363 ff.), and the conception of a legal status of neutrality involving both rights and duties hardly emerged until the 18th century. "Writers of the late 16th and early 17th century . . . failed to envisage the existence of the legal condition which arises from war and to distinguish it from the use of forcible means of obtaining redress, such as reprisals, where a state of war is not in existence. There was not in fact, the same necessity for the modern conception of war as there is today, since the modern notion of neutrality with the rights and duties of neutrals which it involves was non-existent." (A. P. Higgins, "International Law and the Outer World, 1450-1648," *Cambridge History of the British Empire*, Vol. 1, p. 189. See also W. E. Hall, *International Law* (7th ed., 1917), p. 632; Jessup and Deak, *op. cit.*, p. 249 ff.)

were not such as to make it important in protecting the existence and vital interests of states.²⁴ States did not follow Grotius²⁵ in regarding international law as the main bulwark of their security. (Wars were looked upon as a necessary condition of international life) Each fought for its own "reasons of state" or for its own "rights" as it interpreted them, and non-participants regarded such behavior as natural and permissible, guiding their own policies by a prudent desire to conserve their own resources and to extend their wealth and power whenever the necessities or the preoccupation of the belligerents presented an opportunity.²⁶

The belligerents would naturally wish to avoid adding to their enemies, but would not for lesser causes tolerate any hampering of their operations in consideration of neutral interests. The belligerent that started the war would naturally assume his own military superiority and so would count on victory if the war could be kept from spreading, while the victim would hope for powerful allies under the balance of power principle. (Thus, the great states tended to espouse principles of neutrality calculated to localize wars.²⁷) The small states, when participants, would qualify this by expectations of assistance through guaranties or alliances provided by treaties or through functioning of the balance of power.²⁸ When non-participants, they would be even more anxious than the great states to keep the war from spreading in their own direction.²⁹

²⁴ Butler and Maccoy, *The Development of International Law* (London, 1928).

²⁵ *Prolegomena*, sec. 18.

²⁶ Sturzo, *The International Community and the Right of War* (New York, 1930). Machiavelli regarded it as "more frank and princely" and also "more profitable" to make war than "to stand neuter." (The Prince, Ch. 21.) President Jefferson suggested on the outbreak of the Russo-Turkish War (1806) that the United States "milk the cow while the Russians hold her by the horns and the Turk by the tail." (Thomas, *American Neutrality in 1793* (1931), p. 16.) See also J. F. Rippey, *America and the Strife of Europe* (Chicago, 1938), pp. 16 ff., 103 ff. "If a nation is virile and prolific, if the doors to emigration are largely shut, if it lacks raw materials and markets, if it sees less sturdy neighbors in possession of colonial resources, the urge to expansion may become irresistible—even though expansion be unwise and unprofitable. These are biological considerations, in which ethics play only a minor role. Unless then the world is prepared to recognize and satisfy such a country's needs or assumed needs by negotiation, an explosion is quite possible. Some weakly held territory or aging state is then in danger. This has been the traditional, if unfortunate, method of readjusting the tenure of the earth's crust, and until we find a better method, the old one will be hard completely to outlaw." (E. M. Borchard, "Neutrality," *Yale L. J.*, Vol. 48 (1938), p. 40.)

²⁷ This was especially the British policy during the period of imperial expansion in the 18th and 19th centuries. Germany, Italy and Japan urged neutrality to facilitate their aggressions during the 1930's.

²⁸ Thus the United States did its best to obtain allies during the American Revolution, as did China, Ethiopia, Czechoslovakia and Poland when attacked in the 1930's.

²⁹ This is one basis of the traditional American policy of isolationism and of the policy of permanently neutralized states such as Switzerland. See Q. Wright, "The Future of Neutrality," *loc. cit.*, p. 21; "The United States and Neutrality," Public Policy Pamphlet, No. 17 (University of Chicago, 1935), p. 11.

The law of neutrality has not developed, therefore, from the application of general principles, but from the acceptance of concrete rules reconciling the incompatible interests of neutrals and belligerents as they have become manifest in specific situations. It is true that the ideas of *impartiality*, *abstention* of the government from assistance to either side, and *prevention* of direct aid from its territory have given a general direction to the development, but the legal meaning of these words has resulted from a generalization of specific rules which have grown by practice and bargain.³⁰

The belligerents' respect for neutrals has varied greatly according as most of the great Powers were neutral or belligerent, according as the belligerents were sea Powers or land Powers, according to the geographic location of hostilities.³¹ Furthermore, technical development of navies, armies and air forces, of merchant shipping, commercial practices and instruments of international communication, has brought important changes in the conduct of war, especially during the last fifty years.³² Since the concrete compromises upon which rules of neutrality are based have varied from war to war, this branch of international law has always been extremely unstable and controversial.

4. NEUTRALITY AND THE WORLD COMMUNITY

In recent years, however, a more fundamental challenge to the law of neutrality has developed because of a changing sentiment toward the world community and toward the institution of war. This change in sentiment doubtless stems primarily from inventions in communication, transportation and travel, which have increased the material and moral interdependence of states, and have shrunk the time necessary to get ideas or goods from one place to another and to bring about important cultural and political changes in a people. The world has been shrinking and history has been moving more rapidly.³³

While the detailed rules of neutrality cannot be deduced from general principles, this branch of law as a whole does flow from a general principle, namely, that the circumstances under which war is initiated between two states is no concern of other members of the family of nations.³⁴ This

³⁰ Jessup and Deák, *Neutrality, Its History, Economics and Law*, Vol. I, p. xii.

³¹ Pitman B. Potter, *The Freedom of the Seas* (New York, 1924), Chs. 10, 11, distinguishes the policy of the typical continental Power from that of the typical maritime Power. The commentary to the Harvard Research Draft Convention on Neutrality notes the difficulty of making a code applicable to both "small" and "large" wars. (This JOURNAL, Supp., Vol. 33 (1939), p. 487.)

³² Speier and Kahler, *War in Our Time* (New York, 1939), Introduction; Jessup and Deák, *op. cit.*, p. 12 ff.

³³ Eugene Staley, *World Economy in Transition* (New York, 1939), Ch. 1.

³⁴ "In my judgment", wrote Bynkershoek, expressly disagreeing with Grotius, "the question of justice and injustice does not concern the neutral, and it is not his duty to sit in judgment between his friends who may be fighting each other, and to grant or deny anything to either belligerent through considerations of the relative degree of justice." (*Quaestionum*

principle was challenged by the doctrine of just war which lingered from the Middle Ages to the end of the eighteenth century among jurists³⁶ and continued among moralists and theologians.³⁷ The principle is challenged today by the idea of a conventional outlawry of war, theoretically expounded in the peace plans of the seventeenth and eighteenth centuries,³⁷ given some practical application in the post-Napoleonic system³⁸ and the Hague system,³⁹ and realized for a period after the World War by general acceptance of obligations not to resort to war and to consult in case of war.⁴⁰ The

Juris Publici, 1737, I, c. 9, Carnegie ed., p. 61.) Vattel expresses a similar view: "When a war breaks out between two nations, all the others who are not bound by treaties are free to remain neutral." He does, however, counsel them to consider whether there are reasons for taking sides, in which connection the justice of the cause should be examined as well as the national advantage of intervention. (*Droit des gens*, 1758, II, c. 7, sec. 106, Carnegie ed., p. 268.) Wheaton asserts "the right of every independent state to remain at peace whilst other states are engaged in war, is an incontestable attribute of sovereignty." He adds: "It is obviously impossible that neutral nations should be wholly unaffected by the existence of war between those communities with whom they continue to maintain their accustomed relations of friendship and commerce"; but he suggests no interest in the justice of the war's initiation. (*Elements of International Law*, 1836, sec. 414, Carnegie ed., p. 426.)

³⁶ Halleck, even as recently as 1861, devotes a long chapter (15) to "just causes of war," but most 19th-century jurists dismiss the subject as outside their sphere. "The voluntary or positive law of nations," writes Wheaton, "makes no distinction in this respect, between a just and an unjust war." (Sec. 294, Carnegie ed., p. 313.) Lawrence writes that, while "supremely important," the subject is "as much out of place in a treatise on International Law as would be a discussion on the ethics of marriage in a book on the law of personal status." (*Principles of International Law*, 1895, sec. 135, 7th ed., p. 311.) John Bassett Moore seems to take a similar position when, though admitting that international law concedes to war "legality," he denies that neutrality forbids "moral judgments and their translation into action." War he regards as inevitable as procreation. It should be "regulated" to prevent "uncertainty and chaos," but "a legal ban would be both futile and ridiculous." ("An Appeal to Reason," *Foreign Affairs*, July, 1933, p. 558.) A quarter of a century earlier, however, he had considered it "altogether inadmissible" to infer "that a nation may lawfully or properly begin a war at any time and under any circumstances, with or without notice, in its own absolute discretion. . . . If, for example, a nation, wishing to absorb another, or to seize a part of its territory, should, without warning or prior controversy, suddenly attack it, a state of war would undoubtedly follow, but it could not be said that the principles of honor and good faith enjoined by the law of nations had not been violated." (*A Digest of International Law* (Washington, 1906), Vol. 7, p. 171.)

³⁷ John Eppstein, *The Catholic Tradition of the Law of Nations* (Washington, 1936); Robert Regout, *La Doctrine de la Guerre juste* (Paris, 1935); Charles Plater, *A Primer of Peace and War* (New York, 1915), p. 67 ff.

³⁸ Darby, *International Tribunals* (London, 1904); J. A. R. Marriott, *Commonwealth or Anarchy?* (New York, 1939).

³⁹ W. Alison Phillips, *The Confederation of Europe* (London, 1920).

⁴⁰ By urging "powers strangers to the dispute" to offer good offices or mediation, which offer "can never be regarded by one or the other of the parties in conflict as an unfriendly act." (p. 3.)

⁴¹ The obligations were specified in Arts. 11 and 12 of the League of Nations Covenant, and in Arts. 1-3 of the Argentine Anti-War Treaty (1933). They may be implied from the

notion that war anywhere is a concern of all states, and that their concern is to discourage it, was eloquently stated by Elihu Root in 1915⁴¹ and has been recognized as a central theme of the post-World War conventional development.⁴²

Both the medieval and the recent systems assumed that there is a world community and that the members of this community regard the observance of certain fundamental principles as an interest of all of them, no matter who may be the violator or who the victim. It follows that there is a difference between those rules of international law, the violation of which a state can protest only when, as a result, it suffers measurable damage (as to its territory, property, nationals, government, prestige, commercial opportunities or security), and those rules the violation of which a state can protest even when it suffers no such measurable damage, but only the imponderable, but nevertheless important damage consequent upon a weakening of the prestige and the reliability of the law.⁴³

Pact of Paris and, for various regions, from the Washington Nine Power Treaty (1922), the Locarno Treaties (1925), and various Pan American treaties. See Q. Wright, "Effects of the League of Nations Covenant," *Am. Pol. Sci. Rev.* (Nov., 1919), Vol. 13, p. 561 ff.; "The Outlawry of War," this JOURNAL, Vol. 19 (1925), p. 101 ff.; "Neutrality and Neutral Rights following the Pact of Paris," *Proc. Am. Soc. Int. Law*, 1930, p. 81; "Collective Rights and Duties for the Enforcement of Treaty Obligations," *ibid.*, 1932, p. 108 ff.; "The Meaning of the Pact of Paris," this JOURNAL, Vol. 27 (1933), p. 57 ff. For list of anti-war obligations in treaties, see Harvard Research Draft Convention on Aggression, this JOURNAL, Supp., Vol. 33 (1939), p. 861 ff.

⁴¹ This JOURNAL, Vol. 10 (1916), p. 9.

⁴² Harvard Research Draft Convention on Aggression, Introductory Comment, this JOURNAL, Supp., Vol. 33 (1939), p. 823 ff. *Supra*, note 40.

⁴³ The determination of the circumstances which give a state not directly involved a legal interest in a controversy is by no means clear. The Permanent Court of International Justice can decide on the question (Statute, Art. 62), if requests for intervention are made in a case before it. Solon said that all members of a community should contribute to the punishment of all wrongs suffered by their fellow members. (Plutarch, Solon, sec. 18.) Grotius supported the same dictum under natural law, and held that states were free if not obliged to be partial toward the just side in all wars. (I, c. 5, sec. 2, III, c. 17, sec. 3, Carnegie ed., pp. 164, 786.) Elihu Root suggested that in principle, while "ordinary injuries" are redressed only "at the instance of the injured person, and other persons are not deemed entitled to interfere," "certain flagrant wrongs, the prevalence of which would threaten the order and security of the community are deemed to be everybody's business" (*loc. cit.*, *supra*, note 41), and Secretary Hull has taken a similar position. (Statement submitted to all governments, July 16, 1937.) It seems to be generally accepted that all neutrals have a legal interest in all violations of neutral rights (see Harvard Research Draft Convention on Neutrality, Art. 114, this JOURNAL, Supp., Vol. 33 (1939), p. 788 ff.), and that all parties to a multilateral treaty have a legal interest in a violation of the treaty by any party. (Statute, Perm. Ct. Int. Justice, Art. 63; French note, March 30, 1928, on Pact of Paris, Dept. of State, Treaty for the Renunciation of War (Washington, 1933), p. 30; Q. Wright, *Legal Situation in the Far East* (Institute of Pacific Relations, 1939), p. 86.) European public law seems to have recognized certain treaty stipulations and principles to be of general interest and subject to change only with consent of all the great Powers, while they may be changed by bilateral negotiations. (Q. Wright, *op. cit.*, p. 86; H. J. Tobin, *The Termination of Multipartite Treaties* (New York, 1933), p. 11.)

Both the medieval and the recent system also assumed that among the violations of fundamental principles of law which all the states might protest, is resort to violence contrary to international obligation, called in the Middle Ages "unjust war" and in the recent period "aggression."⁴⁴

* Neutrality in the sense of impartiality⁴⁵ is inconsistent with these assumptions.⁴⁶

5. NEUTRALITY AND INTERNATIONAL LAW

One can, however, go even further and assert that, unless these assumptions are accepted, international law suffers a fatal internal inconsistency.

* The coming to light of this inconsistency constitutes the present crisis of international law.

A system of international law must premise the right of states to exist. Every state has a duty to respect the rights and powers which international law has attributed to each state and which in the legal sense constitute its existence.⁴⁷ These rights and powers assure the state the opportunity to possess its domain, to protect its nationals, to govern within its jurisdiction, to enjoy its status and whatever additional benefits it may have acquired through the legal exercise of its powers.⁴⁸

✓ War is in essence a denial of all of these rights. Each belligerent is proposing to bring about the complete submission of the other, thus giving itself both the physical capacity and the legal right to deprive the other of any particular right or even of its existence. As a means to this end, during the course of war, each refuses respect for the enemies' territory, nationals, jurisdiction, status and treaties, subject only to the rules of war professing to forbid inhumanities not dictated by military necessity. Furthermore, the belligerent may limit many of the rights of neutrals, including free navigation of the seas by their vessels. If each state is free to institute a state of war by unilateral action, and by that act to relieve itself of most of the obligations of international law toward its enemy and of many of those obliga-

⁴⁴ Q. Wright, "The Concept of Aggression in International Law," this JOURNAL, Vol. 29 (1935), p. 375 ff.; "The Test of Aggression in the Italo-Ethiopian War," *ibid.*, Vol. 30 (1936), p. 52; Harvard Research Draft Convention on Aggression, this JOURNAL, Supp., Vol. 33 (1939), p. 823 ff.; *supra*, note 43.

⁴⁵ *Supra*, note 20.

⁴⁶ *Supra*, notes 1-4; *infra*, note 49.

✓ ⁴⁷ A state's sociological existence depends on other factors, the operation of which will continually cause the rise of some states, the decay and death of others. (See E. M. Borchard, *supra*, note 28.) A system of law, however, must distinguish between acts within the legal personality, parallel to the physiological changes within an individual, and acts of other members of the community hastening these changes, comparable to assault or murder in individual relations. (Thus, a state can legally lose status, or come to an end only through acts of its own municipal law or of international law, including general recognition by the community of nations, not through acts of the municipal law of another state.)

⁴⁸ See Oppenheim's useful remarks on so-called fundamental rights of states, Vol. 1, sec. 112. See also Q. Wright, "Effects of the League of Nations Covenant," *Am. Pol. Sci. Rev.*, Vol. 13 (1919), p. 557; *Legal Situation in the Far East*, p. 89.

Elster
in 1915

itions toward third states; it is clear that international law takes away with one hand what it gives with the other.) (It both asserts and denies the right of states to exist.) (There is, therefore, an inherent inconsistency in an international law which recognizes the right of states to exist and at the same time grants an unlimited power in states to institute a state of war and an unlimited freedom in states to remain neutral.⁴⁹)

This inconsistency was tolerated during the nineteenth century because of the relative peacefulness of that century. This peacefulness, however, cannot be attributed to these inconsistencies,⁵⁰ but rather to the dominance of British sea power, industry and finance; to the rapidly expanding economy through the development of new overseas markets; and to the relative invulnerability, under existing conditions of technology, of the rising countries in overseas areas.) (During the sixteenth and seventeenth centuries, "the Christian states of Europe," having emancipated themselves from the medieval ecclesiastical and imperial controls, were frequently involved in serious general wars.) (During the twentieth century, the states of a world no larger, under modern technology, than was Europe in the earlier period,⁵¹ having emancipated themselves from British controls are again frequently

⁴⁹ The argument is that by which Hobbes and Locke proved that men would not enjoy legal rights in a "state of nature." Sovereignty in the sense of freedom to make war implies that states are in a "state of nature" and a denial of their subjection to law. See *infra*, note 57, and Q. Wright, "National Sovereignty and Collective Security," *Annals of American Academy of Political and Social Science*, 1936, Vol. 186, p. 94; Arnold Brecht, "Sovereignty," in Speier and Kahler, *War in Our Time* (New York, 1939), p. 58 ff.; Jackson H. Ralston, *Democracy's International Law* (1922), p. 38 ff. "Neutrality is not morally justified unless intervention in war is unlikely to promote justice or could do so only at ruinous cost to the neutral." (Westlake, *International Law*, Vol. 2, p. 90.) "To identify a policy of neutrality with the interests of international peace is one of the strangest hallucinations that ever took possession of clear-headed men." (James Lorimer, *Institutes of the Law of Nations* (1884), Vol. 2, p. 126.) "Neutrality in a war of principles is mere passive existence, forgetfulness of all that makes a people sacred, the negation of the common law of nations, political atheism . . . adhesion to the word of Cain." (Mazzini, quoted in Bolton King, *Life of Mazzini* (Everyman), p. 305.) "The existence of a right to oppose acts contrary to law and to use force for the purpose when infractions are sufficiently serious is a necessary condition of the existence of an efficient international law." (Wm. E. Hall, *International Law* (8th ed.), sec. 93, p. 342.) See Wright, "The Future of Neutrality," *International Conciliation*, 1928, p. 360. "The doctrine of absolute impartiality in all circumstances has not struck such deep roots in international law as to remain unchallenged. It was not deduced from its principles. On the contrary, it is, like the admissibility of war, a denial of the existence of a true legal community among states." (H. Lauterpacht, "Neutrality and Collective Security," *Politica*, Nov., 1936, p. 147.)

⁵⁰ Though admitting that neutrality is "not a cure for war," E. M. Borchard believes it "has done much to ameliorate the duration and the barbarity of war," and "has narrowed the area of conflict, has kept a large part of the world at peace, and has been conducive to the making of sensible treaties of peace." ("Neutrality," *Yale L.J.*, Vol. 48 (1938), p. 53.) A favorable attitude toward neutrality is also expressed by Phillimore, *Commentaries upon International Law*, Vol. 3, p. 226 (2nd ed., 1870); Holland, *Lectures on International Law* (1933), p. 401 ff. See also *infra*, note 34. For contrary view see G. L. Beer, *The English-Speaking Peoples* (New York, 1917), p. 134, and *supra*, note 49.

⁵¹ Staley, *World Economy in Transition*, Ch. 1.

involved in serious general war. In both periods the inconsistencies in an international law tolerant of war have been too glaring for jurists to ignore, and they have asserted limitations upon the power to initiate war and a legal concern of all states in the conditions under which war has been initiated.

We will, therefore, assume that international law must recognize: (1) that states do not have an unlimited power to initiate a state of war; (2) that illegal resort to war violates a legal interest of all states; and (3) that every state is competent to invoke available procedures of international law to protect that interest.

6. NEUTRALITY AND AGGRESSION

These principles, vaguely recognized in the Hague Convention of 1899 for the Pacific Settlement of International Disputes, have been given more definite application in the League of Nations Covenant, the Pact of Paris and other post-war instruments. They are recognized in principle as the basis for the Harvard Research Draft Convention on the Rights and Duties of States in Case of Aggression.⁵² Aggression is there defined as "a resort to armed force by a state when such resort has been duly determined, by a means which that state is bound to accept, to constitute a violation of an obligation." "Aggressor," "defending state," "co-defending state" and "supporting state" are also defined.

This definition suggests that, unless the illegality of a resort to force "has been duly determined by a means" which the delinquent state "is bound to accept," third states ought to consider the situation "war," and ought to be "neutral."⁵³ It is difficult to see, however, why an authoritative determination of "aggression" should be more essential than an authoritative determination of "war." If non-participants in hostilities without a proper determination of the first, pursue policies of partiality, they may be unjustly depriving an innocent state of rights under the impression that it is an aggressor. (But it is equally true that if non-participants proclaim neutrality, they may be depriving a victim of aggression of rights to which it should be entitled.) While the presumption of innocence is perhaps sound in criminal proceedings after the event, this presumption seems scarcely applicable in determining the appropriate attitude of third states toward states engaged in hostilities, both of which are bound by obligations not to resort to force. In such a case, as Secretary Stimson has pointed out, both states may be guilty but both states cannot be innocent.⁵⁴

There is no general principle of compulsory adjudication under international law.⁵⁵ This is undoubtedly a serious lacuna. All breaches of international law should, doubtless, be promptly determined by a definitive

⁵² *Supra*, notes 39-42.

⁵³ This JOURNAL, Supp., Vol. 33 (1939), p. 871 ff.

⁵⁴ *Supra*, note 4. See also Q. Wright, Proc. Am. Soc. Int. Law, 1930, pp. 79-80.

⁵⁵ Eastern Carelia Case, Perm. Ct. Int. Justice, Ser. B, No. 5; H. Lauterpacht, The Development of International Law by the Permanent Court of International Justice (London, 1934), p. 34 ff.

procedure which the parties are bound to accept, whether the alleged breach is of an anti-war or other international obligation.⁵⁶

(The only procedure for the determination of breaches of international law, in the absence of specific commitment to adjudicate, is diplomacy) Negotiation may result in an authoritative determination because of direct agreement of the interested states, including the one whose behavior has been objected to, or an agreement of the latter to submit to some form of adjudication. (If neither of these events occur, the matter has been, in practice, left to the self-determination of each state) Each one is judge in his own case, a condition of an anarchy which, unfortunately, international law has tolerated.⁵⁷ Clearly if each non-participant in hostilities individually passes on the guilt or innocence of the participants and discriminates against the state which it thinks has illegally resorted to hostilities, the various non-participants may decide differently, and there may be serious confusion. It is because of this inability of the family of nations to accept the principle of obligatory adjudication, that the Harvard Draft on Aggression assumes a cautious attitude. But as noted, the jural situation becomes, under modern conditions, equally confused if non-participating states unilaterally decide that none of the participants in hostilities have broken obligations, and so proclaim neutrality.⁵⁸

⁵⁶ The political consequences of the breach of some obligations may be more serious than of others, and the sources from which to determine whether there has been a breach may be more definite in some obligations than in others. These seem to be the considerations involved in the distinction between non-justiciable and justiciable disputes and between political and other treaty provisions. See Q. Wright, *The Control of American Foreign Relations* (New York, 1922), p. 214. A dispute may be non-justiciable in the sense that no court has jurisdiction, but in substance there are no non-justiciable disputes. (Lauterpacht, *The Function of Law in the International Community*, pp. 21, 60, 435.)

⁵⁷ Brierly, *The Law of Nations* (2nd ed., Oxford, 1936), p. 257 ff.; Q. Wright, "The Meaning of the Pact of Paris," this JOURNAL, Vol. 27 (1933), pp. 45-46; *Control of American Foreign Relations*, pp. 209-215. "The inconveniences of the state of nature must certainly be great where men may be judges in their own case; since it is easy to be imagined, that he who was so unjust as to do his brother an injury, will scarce be so just as to condemn himself for it. . . . It is often asked . . . 'where are, or ever were there any men in such a state of nature?' To which it may suffice as an answer at present, that since all princes and rulers of independent governments, all through the world, are in a state of nature, it is plain the world never was, nor ever will be, without numbers of men in that state." (John Locke, *Of Civil Government* (1690), II, c. 2.) Lauterpacht (*op. cit.*, p. 429) points out that the claim of a state to judge its own case in an international controversy is necessarily a claim to judge the other party to that controversy, in violation of the rule of sovereigns' immunities.

⁵⁸ This may not have been true in the less interdependent world of the 17th century, and Grotius suggested that when the justice of a war could not be determined, third states should be impartial. (II, c. 17.) Application of this policy, the inadequacy of the criteria and procedures for determining the justice of wars, and the befogging of the criteria which existed by the doctrine of "invincible ignorance," which suggested that a war might be just on both sides, contributed to the rise of the idea of neutrality. Jessup and Deák, *op. cit.*, pp. 8-10; Butler and MacCoby, *op. cit.*, p. 114; Ballis, *op. cit.*, pp. 86, 98, 102-104.

7. RECOGNITION OF WAR AND AGGRESSION

It is believed that the acknowledgment that the violation of certain rules of international law is a concern of all members of the community of nations, implies the capacity of those members juridically to establish the fact of violation by general recognition. It is a familiar doctrine that such questions as whether a state exists *de jure*, whether a government exists *de jure*, whether territory has been acquired *de jure*, are determined by general recognition. This does not mean that the majority rules, nor does it mean unanimity, but rather the consensus of states.⁵⁹ (It is abundantly clear that decisions of this type are not decisions purely of fact, but are decisions involving elements of fact, of policy and of law) (The recognizing state has weighed its interpretation of the factual situation in view of its legal commitments and of its political interest in accepting or attempting to change that situation, and has decided upon recognition or non-recognition)⁶⁰

While organs of the state are bound by its municipal law to conform their behavior to such a decision taken by the political departments,⁶¹ a recognition by one state does not alter the situation in international law until it has become general.⁶²

⁵⁹ Oppenheim writes, the meaning of "common consent" is not "a question of theory but of fact only. It is a matter of observation and appreciation, and not of logical and mathematical decision. Just as the well known question, How many grains make a heap?" (Vol. I, sec. 11.) A. Lawrence Lowell writes, in order for an "opinion" to be "public," "a majority is not enough, and unanimity is not required, but the opinion must be such that while the minority may not share it, they feel bound, by conviction, not by fear, to accept it." (Public Opinion and Popular Government (New York, 1914), p. 15.) The Anglo-Saxon practice of establishing a king indicates the use of general recognition in an imperfectly organized society. "At no time during the Anglo-Saxon period was there a body of men that was conscious of any constitutional right to elect the king. There might be a somewhat formal acceptance, by the great men, of him whom heredity or conquest had pointed out as their lord and leader; and such warriors and populace as had naturally gathered at the time and place at which a new sovereign was to be proclaimed might show their approval by acclamation. But these men, great and small, were acting in a purely personal capacity, not as standing for the nation. However, no presumptive king could feel at all sure of his throne until he had received this recognition." (A. B. White, The Making of the English Constitution (New York, 1908), pp. 51-52, citing Chadwick, Studies on Anglo-Saxon Institutions, pp. 357-366.)

⁶⁰ Q. Wright, "The Power to Declare Neutrality under American Law," this JOURNAL, Vol. 34 (1940), p. 303 ff.

⁶¹ In re Cooper (1892), 143 U. S. 472, 502; Jones v. United States (1890), 137 U. S. 202, 212; Moore's Digest, Vol. 1, pp. 246 ff., 743 ff.; Q. Wright, Control of American Foreign Relations, p. 172 ff.

⁶² In the Tinoco Arbitration (Great Britain and Costa Rica, 1923, this JOURNAL, Vol. 18 (1924), p. 147), the tribunal held that recognition by various governments was only of evidential value in proving the existence of a general *de facto* government. For practice in application of the "non-recognition doctrine," see Q. Wright, Legal Situation in the Far East, p. 3 ff., and discussions by Briggs, Padelford, Wright, et al., Proceedings, American Society of International Law, 1940.

Thus, general recognition may be regarded as an act of the family of nations as a whole. It may be either legislative or judicial in character. It may be achieved either by the gradual accumulation of individual recognitions or by a collective act by which most of the states simultaneously recognize the new situation.⁶³

The flaws in such a vague system are obvious. It leaves undetermined which and how many recognitions are required in a given situation, and when and in what form they must be manifested. Yet general recognition is the procedure by which decisions of general interest applying or changing international law have been made in practice.⁶⁴

In view of the increase in the number of obligations of states not to resort to war or force, the system of recognition has been applied to determine whether *de facto* hostilities constitute war, civil strife, reprisals or aggression, and whether the status of a given state or government during such hostilities is one of belligerency, neutrality, insurgency, peace, aggression, defense or support. While formerly the status of either belligerency or neutrality could be thrust upon all states of the world by the unilateral act of a single state in declaring war or resorting to acts of war, thus manifesting an intention to make war upon another state,⁶⁵ this is no longer true. When hostilities exist, the status of belligerent, neutral, insurgent, state at peace, aggressor, defending state or supporting state, depends, not upon the act of any one state, but upon general recognition by the members of the family of nations.⁶⁶

Judged by this criterion not many of the hostilities of the past decade have been wars in the legal sense. In the Chaco hostilities, although Paraguay declared war (1933), the League of Nations recognized Paraguay as an aggressor and Bolivia as the victim and urged the members to apply

⁶³ See Q. Wright, "The Stimson Note of Jan. 7, 1932," this JOURNAL, Vol. 26 (1932), p. 342 ff.; "The Legal Foundations of the Stimson Doctrine," Pacific Affairs, Vol. 8 (1935), p. 439 ff.; Sir John Fischer Williams, "The New Doctrine of Recognition," Grotius Society, Proceedings, 1932; Malbone W. Graham, The League of Nations and the Recognition of States (University of California Press, 1933); In Quest of a Law of Recognition (*idem*).

⁶⁴ H. Lauterpacht and E. M. Borchard on the "Non-Recognition Doctrine," in Q. Wright *et al.*, Legal Situation in the Far East (Institute of Pacific Relations, 1940). Graham (In Quest of a Law of Recognition, p. 22), contends that "the system of collective recognition of states, marking a stage upward from the chaos of individual caprice to the cosmos of collaborative effort, is here to stay, for it is indissociable from the nature and indissociable from the functioning of organized international society."

⁶⁵ Q. Wright, "When Does War Exist?" this JOURNAL, Vol. 26 (1932), p. 362 ff.

⁶⁶ Q. Wright, "The Power to Declare Neutrality under American Law," *ibid.*, Vol. 34 (1940), p. 306; Comments, Proc. Am. Soc. Int. Law, 1938, pp. 122-124, 146, 150. The national documents recording such recognitions have been collected in Deak and Jessup, A Collection of Neutrality Laws, Regulations and Treaties of Various Countries (2 vols., Washington, 1939), and World Peace Foundation, The Neutrality of the United States, Laws, Proclamations, etc. (1940). Certain of the international documents have been collected in the appendices to Q. Wright (ed.), Neutrality and Collective Security (Chicago, 1936).

discriminatory embargoes against the former. The United States characterized the situation as "armed conflict," imposed a special embargo applicable to both countries, and did not invoke neutrality legislation.⁶⁷ In the Sino-Japanese hostilities, the League of Nations declared in 1932 that Japan had resorted to hostilities in violation of its obligations under the Covenant and the Pact of Paris, and when hostilities were renewed in 1937, Japan being no longer a member of the League, that body declared its action to be in violation of its obligations under the Pact and the Nine Power Treaty. The United States associated itself with these findings, especially at the Brussels Conference of 1937, and has not invoked neutrality legislation. On the contrary it has made public loans to China and has sponsored a moral embargo upon the export of certain materials to Japan.⁶⁸

In the Italo-Ethiopian hostilities (1935), the League of Nations declared that Italy had "resorted to war" in violation of the Covenant and most of the members of the League supported Ethiopia by applying embargoes against Italy. The United States recognized the situation as war and applied the recently enacted Neutrality Act, although official utterances suggested that Italy had violated the Pact of Paris.⁶⁹ The Spanish hostilities (1936) were not recognized as war by any state, though most of the European Powers imposed special embargoes applicable against both sides. The United States did the same, characterizing the situation as "civil strife." Although urged to do so by the Spanish representative, the League of Nations did not characterize the intervention of Italy and Germany in Spain, nor did the United States.⁷⁰

The German occupation of the Rhineland (1936) was characterized by the League of Nations and the Locarno Powers as a treaty violation, but since there was no military resistance, not as an aggression.⁷¹ The German invasions of Austria (1938), Czechoslovakia (1939), and Memel (1939), and the Italian invasion of Albania (1939) did not involve prolonged hostilities and were not characterized by the League of Nations. The United States and other states, however, asserted the non-recognition doctrine with respect to Czechoslovakia and other of these episodes, thus implying that the

⁶⁷ Q. Wright, "The Concept of Aggression in International Law," this JOURNAL, Vol. 29 (1935), p. 373.

⁶⁸ Q. Wright, *The Existing Legal Situation in the Far East*, pp. 3-5, 99-100; "The Denunciation of Treaty Violators," this JOURNAL, Vol. 32 (1938), p. 527.

⁶⁹ Q. Wright, "The Test of Aggression in the Italo-Ethiopian War," *ibid.*, Vol. 30 (1936), p. 45 ff. Certain official references by the United States to the Pact of Paris suggested that Italy had violated that instrument. See Q. Wright, "The Denunciation of Treaty Violators," *ibid.*, Vol. 32 (1938), p. 527.

⁷⁰ Norman J. Padelford, "International Law and the Spanish Civil War"; "The International Non-Intervention Agreement and the Spanish Civil War," *ibid.*, Vol. 31 (1937), pp. 226 ff., 578 ff.

⁷¹ Q. Wright, "The Rhineland Occupation and the Enforcement of Treaties," *ibid.*, Vol. 30 (1936), p. 487 ff.

occupations had occurred in violation of the Pact of Paris or other treaties.⁷²

The League was also silent in regard to the German invasions of Danzig and Poland (1939) and the hostilities which have followed. Great Britain and France regarded Germany as an aggressor and went to the aid of Poland in accord with treaty obligations and as permitted by the Pact of Paris. Other countries, however, recognized these hostilities as war. The United States invoked neutrality legislation with respect to the hostilities between Germany on the one hand and Poland, France, Great Britain and all of the Dominions except Ireland on the other,⁷³ and sponsored neutrality declarations by the American countries at the Panama Conference.⁷⁴ The United States also proclaimed neutrality in the hostilities initiated by the German invasions of Norway, The Netherlands, Belgium and Luxemburg, and the Italian declaration of war against Great Britain and France (1940), but not with respect to the German invasion of Denmark (1940).⁷⁵ Official statements of the President and Secretary of State have, however, characterized these invasions as "aggression,"⁷⁶ and airplanes have been released from Government stores for transfer to the Allies.⁷⁷ Recognition of these hostilities as "war" and invocation of "neutrality" appear to have been inconsistent with these statements and actions.

The League of Nations characterized the Soviet invasion of Finland (1939) as aggression and dismissed the Soviet Union from the League, while urging its members to give aid to Finland. The United States similarly characterized the Soviet invasion, refused to invoke neutrality, and made Government loans to Finland.⁷⁸

The position of states has not been in all cases consistent, but it seems doubtful whether, judging by official declarations and recognitions, any of these hostilities could be called war in the legal sense, with possible exception of those by France, Great Britain and the Dominions against Germany and Italy. In the other cases the dominant opinion of states seems to have recognized the situation as one of aggression or of insurrection.

This new situation, which makes it uncertain what behavior will be appropriate for states on the outbreak of hostilities, has been reflected in the wide degree of discretion provided in the application of recent neutrality statutes. Thus, under the American Act of November 4, 1939, the issuance

⁷² Q. Wright, "The Munich Settlement and International Law," *ibid.*, Vol. 33 (1939), p. 12 ff.; Dept. of State Press Releases, March 25, 1939, pp. 219-221.

⁷³ Dept. of State Bulletin, Sept. 9, 1939, p. 203 ff.; Sept. 16, 1939, p. 246 ff.; Nov. 4, 1939, p. 453 ff.

⁷⁴ *Ibid.*, Oct. 7, 1939, p. 327.

⁷⁵ *Ibid.*, April 27, 1940, p. 429; May 11, 1940, p. 489.

⁷⁶ *Ibid.*, April 13, 1940, p. 373; May 11, 1940, p. 493; President Roosevelt's address, June 10, 1940.

⁷⁷ Press reports, June 7, 1940.

⁷⁸ Dept. of State Bulletin, Dec. 2, 1939, p. 609; Jan. 13, 1940, pp. 19-20; Jan. 20, 1940, p. 55; March 16, 1940, p. 295.

of a proclamation of neutrality is contingent upon a "finding" by the President or by the Congress (1) that a "state of ~~war~~ exists between foreign states," and (2) that such a proclamation is "necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States."⁷⁹ As noted, the President has exercised the discretion here given in declining to invoke the legislation in several of the recent hostilities.

8. NEW CONCEPTS OF VIOLENCE

The nineteenth-century textbooks of international law were divided into three nearly equal sections entitled respectively, peace, war and neutrality. The recent blurring of the distinction between these three conditions and the introduction of new concepts, such as aggression, insurrection, defense, support, sanctions, has been deplored by some and approved by others. But it seems probable that these new concepts are here to stay.⁸⁰

The effort to organize the world to prevent war by effective sanctions has not been successful, but the effort has manifested a general realization that in the modern world hostilities anywhere are the concern of all states, that resort to hostilities except in defense is in principle a breach of law, and that until the states are able to organize for effectively preventing such breaches, they ought, as Grotius suggested, to do nothing to hamper the defender or to assist the violator, only treating them impartially when the uncertainty of the origin of the war makes general recognition of aggression impossible, or when the dangers to a particular state would make partiality inexpedient.⁸¹

With this development of international law, war as a legitimate method of settling an international dispute and of imposing a status of neutrality upon the non-participants, would be on the way out, as the medieval trial by battle and the Renaissance duel of honor were on the way out in private relations when forbidden by national and ecclesiastical legislation.⁸² War and neutrality as legal conditions, instead of flowing from the exigencies of the participants, would, under such conditions, flow only from the limitations of the non-participants. (The duel of states, with which third parties had no right

⁷⁹ Q. Wright, "The Power to Declare Neutrality under American Law," this JOURNAL, Vol. 34 (1940), p. 302 ff.

⁸⁰ G. G. Wilson, "War Declared and the Use of Force," and discussion following, Proc. Am. Soc. Int. Law, 1938, p. 106 ff.

⁸¹ Grotius, *op. cit.*, III, c. 17, sec. 3 (Carnegie ed., p. 786); Vattel, *op. cit.*, III, c. 7, sec. 106 (Carnegie ed., p. 268).

⁸² See Frederick R. Bryson, *The Sixteenth Century Italian Duel* (Chicago, 1938). Ecclesiastical Councils began to prohibit dueling as early as the 12th century (p. xxvi), but did not do so effectively until the Council of Trent, 1563 (p. 118). Legislation prohibiting dueling was enacted in Venice, Naples, the Empire, and France in the 16th century (pp. 103, 131), but was not adequately enforced for many years. Trial by battle was not formally abolished in England until 1819. (59 Geo. III, c. 46, following case of *Ashford v. Thornton*, 1 Barn. and Ald. 405, in which the legality of such a trial was recognized.)

to interfere, would have degenerated into a street brawl which continued only because third parties lacked the courage, the capacity or the organization to stop it, but which everyone deplored. From such attitudes the hue-and-cry, vigilance committees, and eventually effective police, might grow and in time create a law-governed world.⁸² The present status of neutrality is still at the early stages of such a development.

9. VALUE OF NEUTRALITY

Neutrality has, however, been suggested as an essential condition of international law, a law which, we are told, is based on the coördination of equals, not the subordination of parts to the whole.⁸⁴ But does not the idea of law imply subordination of the part to the whole, of the member to the community?⁸⁵ *Ubi jus, ibi societas est.* (The concept of a jural law among persons, each of which defines his own obligations, judges his own causes, and enforces his own judgments, is self-contradictory.)⁸⁶ (While an external observer may describe the character and tendencies of such a system, thus

⁸² "There have been periods in the history of nations when in the absence of legal tribunals, in the absence of an organized police force, the sense of mutual obligation, which lies at the root of every legal system, has been so strongly developed that an act of violence done to the person or property of one member of the community has been resented as a wrong to all its members. In such a case neutrality is impossible. It is a disgrace, a crime. The hand of every man is against the wrongdoer. He becomes an outlaw. No one may feed him or succour him or assist him to escape. Everyone must join in his arrest and punishment. . . . To this strong sense of mutual obligation we owed in this country what is known as the 'hue and cry,' long regarded as an effective deterrent against crimes of violence. From it arose on the other side of the Atlantic that system of communal justice which, however rough and ready, contributed so largely to the establishment of law and order in the Western part of the American Continent. From it legal tribunals and an organized police force will readily develop. Without it no reign of law is possible." (Lord Parker of Waddington in House of Lords, March 19, 1918, quoted in Sir Alfred Zimmern, *The League of Nations and the Rule of Law* (London, 1936), p. 175.)

⁸⁴ Oppenheim, *op. cit.*, Vol. 1, secs. 9, 20; Borchard and Lage, *op. cit.*, pp. 1-3; Borchard, "Neutrality," *Yale L. J.*, Vol. 48 (1938), p. 39. Lauterpacht examines the doctrine exhaustively and rejects it. (*The Function of Law in the International Community*, p. 407 ff.)

⁸⁵ "Law is a body of rules for human conduct within a community which by common consent of the community shall be enforced by external power." (Oppenheim, *op. cit.*, Vol. 1, sec. 5.) The attempt to apply this definition to international law, conceived as a law enforced only by "self-help and intervention" (*ibid.*, sec. 9), is not entirely satisfactory, as Oppenheim admits when he writes: "By the establishment of the League of Nations there is now more reason to hope than in former times, that the smaller and weaker States will not be at the mercy of the larger and stronger Powers, in case of a conflict between their interests." (*Ibid.*) The necessity of positing a society of states (*Civitas Maxima*) superior to the states, as the authority for the law of nations was perceived by Grotius (*Proleg.*, sec. 17) and Wolff (Preface, and *Proleg.*, sec. 7, Carnegie ed., pp. 6, 11), but not by Vattel (Preface, Carnegie ed., p. 9 a). See also Westlake, *Chapters on the Principles of International Law* (Cambridge, 1894), pp. 2-4; J. L. Kunz, "The Theory of International Law," *Proc. Am. Soc. Int. Law*, 1938, pp. 29-30.

⁸⁶ *Supra*, note 57.

making for it a "natural law," the participants themselves cannot be said to be bound by jural law.) (To say that international law has the special character of a law of coordination is to say that it is not law at all.^{86a})

Neutrality has also been said to have demonstrated its value in history as a means of localizing war, discouraging war, keeping out of war, and regularizing international relations.⁸⁷ It is, however, difficult to prove that neutrality has, in reality, served any of these purposes except the last. Wars have been localized under technological conditions which have made it unlikely that outside states would know about them or that the interests of such states would be threatened by their results,⁸⁸ or under political conditions which would make intervention dangerous to the intervener.) (Far from discouraging war, neutrality, in so far as it has had an effect, has tended to encourage aggression of the strong against the weak.⁸⁹ Far from assisting states to keep out of war, neutral rights have themselves provided the basis for disputes which have drawn non-participants into war.⁹⁰ Original non-participants have sometimes stayed out of wars, even in recent times, although this has been rare in the case of great Powers if the war lasted as long as two years,⁹¹ but their success in doing so has been attributable less to rigorous observance of the rights and duties specified by the law of neutrality than to their adoption of a flexible policy capable of rapidly adjusting their demands and concessions to changing situations.⁹²)

^{86a} E. M. Borchard insists that international law is obligatory, although it operates within a very narrow field and has the special character of being a law among equals which cannot be enforced by the society. This suggests that it is not obligatory in the legal sense. *Proc. Am. Soc. Int. Law*, 1933, p. 34 ff.

⁸⁷ Borchard, "Neutrality," *Yale L. J.*, Vol. 48 (1938), p. 53.

⁸⁸ This factor has accounted for the localization of wars in primitive times and during most of history. "No person in his senses would dream of enquiring whether a prince ought to assume an obligation to interfere in a war waged by very distant princes with whom he has no connection or intercourse whatsoever; for instance whether in a war between the Chinese and the Japanese the Emperor of Morocco is in justice bound to intervene as a party." (Galliani, 1782, quoted by Lauterpacht, "Neutrality and Collective Security," *Politica*, 1936, p. 152.)

⁸⁹ The reversion from collective security to neutrality was labored for by the dictators before undertaking their aggressions and undoubtedly proved of great assistance to Hitler. (Marcel Hoden, "Europe without the League," *Foreign Affairs*, Oct., 1939, Vol. 18, p. 13 ff.)

⁹⁰ Defense of neutral rights was the formal, if not the substantial, reason for American entry into war in 1798, 1812, and 1917.

⁹¹ Q. Wright, *The Causes of War and the Conditions of Peace* (London, 1935), p. 114.

⁹² Charles Warren, "Congress and Neutrality," in Q. Wright (ed.), *Neutrality and Collective Security* (Chicago, 1936), pp. 115, 148. "The whole history of neutrality, and in particular the history of neutrality during the World War, would indicate that neutrality is a makeshift, based upon expediency, made possible only by the unstable condition of international society." (A. Vandenbosch, *The Neutrality of the Netherlands During the World War* (Grand Rapids, Mich., 1927), p. 315.) "Legislation having as its object to keep a state out of war must tend to be opportunist and to vary with the fortunes of war or with the effectiveness of the threats and the propaganda put forth by the respective belligerents." (G. G. Wilson, this *JOURNAL*, Vol. 34 (1940), p. 89.)

The status of neutrality may have served to regularize relations and to provide standards whereby a government could instruct its officials, but few if any of the rules have remained immune from violent international argument as the situation of the various belligerents and neutrals has changed. Recent neutrality regulations, in recognizing extensive zones of the high seas in which new neutral rights are asserted or the exercise of old rights is renounced, and in providing novel restrictions upon neutral navigation, commerce and travel, have considerably qualified this advantage. These changes have raised new questions as to the degree in which a neutral is under an international obligation to enforce rules beyond the traditional requirements of international law, and to refrain from protesting belligerent acts enforcing the neutral's municipal renunciations.⁸³ The benefits of the law of neutrality are, therefore, at best dubious, and its disadvantage in perpetuating an inconsistency and preventing the healthy progress of international law toward effectiveness, may be momentous or even disastrous.⁸⁴

10. NEUTRALITY AND THE *PAX BRITANNICA*

It has been suggested that since the mid-eighteenth century, international law has been turned from the path of juristic development by a false doctrine of neutrality tending to make the world safe for the powerful, to give free reign to man's aggressive impulses, and to discourage the effort to organize international relations by reason.⁸⁵ (The inconsistency of neutrality with an

⁸³ Q. Wright, "Rights and Duties under International Law as affected by the United States Neutrality Law and the Resolutions of Panama," this JOURNAL, Vol. 34 (1940), p. 238 ff.

⁸⁴ "So long as we refuse to cooperate with other nations in trying to prevent the happening of a war, we are going to remain in a distinctly uncomfortable and precarious condition. In a neighborhood of highly inflammable buildings, to rely on the supposedly fireproof quality of one's own house, and to make no effort to prevent a conflagration starting, is a dangerous means of trying to 'play safe.'" (Warren, *loc. cit.*, p. 153.) "Once we admit the rightfulness of war and the power of combatants to lay down their own rules of action to control neutrals, we cut from under us any ground of complaint of casual invasions of the territory of neutrals, such invasions being merely a particular form of disregard for the rights of others. We should not complain of the form of the act but of the fundamental wrongful conception." (Ralston, *op. cit.*, p. 28.)

⁸⁵ Van Vollenhoven thus berates the destruction of the Grotian system by 18th-century writers: "At this pregnant moment (the age of the enlightenment) at this moment which will have to choose between the prosaic, helpless Primitive Law of Nations and Grotius's sacred doctrine of duties; the most fatal thing occurs that could possibly occur; a deed of treachery. . . . Vattel may possibly have been a good man in the opinion of his relations and domestic servants; but he gave a Judas-kiss to Grotius's system. . . . According to Grotius, the criminal state may be punished by the others. According to Vattel even the country invaded, foaming at the mouth with anger, may not judge of the assaulter of its territory. 'Nous ne sommes point reçus à nous plaindre de lui, comme d'un infracteur du Droit des Gens.' (III, c. 12, sec. 190.) How could the learned and discerning Grotius (he elsewhere observes) err so much as to ascribe even to a neutral nation a right to judge of the conduct of a sovereign state?" (The Three Stages in the Evolution of the Law of Nations (The Hague, 1919), pp. 26-29.) See also Van Vollenhoven, *The Law of Peace*

effective international law was obscured during the nineteenth century because Great Britain had so firm a devotion to law and liberty internally, that British control of the world, facilitated by the doctrine of neutrality, did not wholly destroy the rule of law. Neutrality lasted because it facilitated the *Pax Britannica*. Its influence in weakening the law of nations was not observed because the law of England was substituted.⁹⁶

The way in which British leadership was maintained during this period deserves careful study because it throws light on the methods which might be successfully employed by an international association. (Caution, insistence on a legal basis for intervention, use of persuasion rather than force, preference for economic pressures if force was used, reluctance to assume general responsibilities were characteristic of British policy)⁹⁷ (Yet the strength of the British Navy, the established rights of belligerents at sea, the influence of British finance, the general dependence on British commerce, the prestige of British diplomacy, provided the substance of power beneath this suave exterior and assured the success of British policy, generally without violence.)⁹⁸ (That policy successfully pursued such permanent objectives as maintenance of British naval supremacy; establishment of rules of war and neutrality favoring sea power; prevention of dominance of any one Power on the continent of Europe; preservation of the independence of the Low Countries; secure passage to India (Gibraltar, Malta, Suez, Aden, Colombo);

(London, 1936); Luigi Sturzo, *The International Community and the Right of War* (New York, 1930); Ralston, *op. cit.*, Ch. 1. Disagreeing with Sir Alfred Zimmermann's "conclusion" that "positive international law so called, has no claim to the name of law" (*International Affairs*, Vol. 17 (1938), p. 3), Norman Mackenzie points out "that the international community is primitive and heterogeneous; that there is no central authority or organized group exercising control in it; that its procedural facilities are definitely limited; that resort to the extra-legal procedure of violence and war, as an option or substitute for law and legal procedure, is still possible and proper; that much, if not all, of the popular criticism directed at international law arises out of this fact, and out of the practice of international lawyers claiming that such violent procedure is within the field of international law." (*Proc. Am. Soc. Int. Law*, 1938, pp. 7, 22-23.)

⁹⁶ "Sir Henry Maine, in his volume on international law, dismisses Austin's criticisms on that system as 'very interesting and quite innocuous,' and rather scouts the supposition 'that Austin had intended to diminish, and had succeeded in diminishing, the dignity or imperative force of international law.' I am altogether unable to accept this cheerful view. I think it may easily be shown that at one time Austin's relegation of international law to the sphere of morality had a pronounced effect even upon legal decisions in England, as in the case of the *Franconia*. (*Queen v. Keyn*, [1876] 2 Ex. Div. 63.)" J. B. Moore, "Law and Organization," *Am. Pol. Sci. Rev.*, Vol. 9 (1915), p. 4, reprinted in *International Law and Some Current Illusions* (New York, 1924), p. 293. The continued prevalence of the Austinian conception of international law is indicated by several papers by Sir Alfred Zimmermann and other evidence adduced by Norman Mackenzie. *Supra*, note 95.

⁹⁷ See Ellery Stowell, *Intervention in International Law* (Washington, 1921).

⁹⁸ Zimmermann, *The League of Nations and the Rule of Law, 1919-1935* (London, 1936), p. 87 ff.; "Economic Aspects of Collective Security," in Q. Wright, *Neutrality and Collective Security*, p. 34; Callendar, *The Naval Side of British History* (1924), p. 237; Admiral Sir Herbert Richmond, *National Policy and Naval Strength* (London, 1928).

alliance with Portugal assuring use of bases on the Tagus and in the Azores, Madeira and Cape Verde Islands; maintenance of naval bases, protectorates and colonies in the great strategic areas of the Near East (Suez, Egypt, friendly to Turkey), the Middle East (Muscat, Bahrein, Koweit, Afghanistan), the Far East (Singapore, Malaya, Hong Kong), and the Caribbean (Jamaica, Belize, Bermuda, Lesser Antilles). British policy was also usually successful in particular objectives, such as emancipating Latin America (1822); partition of The Netherlands and neutralization of Belgium (1831); localization of wars of Italian (1859), American (1861), German (1870) and Balkan (1828, 1878, 1885) nationalism; freer trade with France (1860); control of Egypt and Suez (1878); prevention of Russian control of the Balkans (1878); suppression of the slave trade (1890); peaceful partition of Africa and Pacific Islands with British acquisition of key areas (1890); open door in China (1898); elimination of scandalous conditions in treatment of natives (Central Africa, 1885; Congo, 1908; Putumayo, 1912).⁹⁹

Taken as a whole, British power proved adequate during the nineteenth century (1) to organize the British Empire with a quarter of the world's population as an increasingly free union of dominions, colonies and protectorates in various stages of evolution toward independence in the spirit of the common law;¹⁰⁰ (2) to organize Europe, with another quarter of the world's population, as a balance of power controlled by British policy operating through the "Concert of Europe" so effectively that the peace was only occasionally broken by relatively localized wars;¹⁰¹ (3) to organize the world outside Europe and the Empire as a body of independent states of varying degrees of dependence upon British finance and naval control sufficient to keep wars localized;¹⁰² and (4) to organize commerce everywhere according to the system of freedom of enterprise, freedom of trade, and freedom of capital movement, thus relieving political frontiers of the severe strain to which they would be subjected if they constituted also impassable economic frontiers.¹⁰³ From Waterloo to the Marne, British sea power,

⁹⁹ Cambridge History of British Foreign Policy; Stowell, *Intervention in International Law*.

¹⁰⁰ "From the point of view of the dominions the important point to note is the evolution from a position of dependence to one of freedom from control. These great communities have all the time been climbing a ladder. Now they have reached the top; but the climbing process is common to all the communities which form part of the Empire. Each of them, whether the population is predominantly white or predominantly colored, is gradually, as it develops in strength and capacity, passing upward from the stage in which the community is wholly subject to control exercised from London to that in which the measure of control diminishes, and so on to that in which the control has ceased entirely. The dominions of today were but crown colonies in the past. The crown colonies of today will be dominions in days to come. There is nothing static about the British Empire." (Sir Cecil J. B. Hurst, *Great Britain and the Dominions* (Chicago, 1928), p. 12.)

¹⁰¹ Zimmern, *The League of Nations and the Rule of Law*, pp. 72-86.

¹⁰² *Supra*, note 98.

¹⁰³ G. M. Fisk, *International Commercial Policies* (New York, 1915), pp. 39 ff., 237 ff.; Clive Day, *A History of Commerce* (London, 1907), pp. 348 ff., 365 ff.

British industrialization and British finance, supported by barriers of distance and cultural backwardness, sustained these political and economic structures. They made the nineteenth century the most peaceful and the most progressive in human history. Under it the population of the world doubled, the population of Europe quadrupled, and the standards of living generally went up. British hegemony was a service to mankind, but it was British and not international.¹⁰⁴

The basis of this control was gradually weakened. (1) The primary cause was probably the inventions of steel navies, submarines, and aircraft which reduced the invulnerability of the British Isles and the capacity to exercise naval control at great distances.¹⁰⁵ (2) The process of self-determination within the Empire itself, especially by Ireland and India, reduced the Empire's prestige and capacity centrally to direct the policy of the whole. As the Empire itself became democratized its capacity to dominate others declined.¹⁰⁶ (3) The rise of nationalism in Europe and of industrialization on a national basis resulted in colonial expansion by France and Germany after 1870, their increasing capacity and inclination to challenge British dominance in the world and Britain's decreasing ability to maintain the balance of power in Europe and to localize wars.¹⁰⁷ (4) The rise of the power of the United States and Japan challenged the British position in America and the Far East, creating a world balance of power which Britain could not dominate.¹⁰⁸ (5) The prestige of free enterprise, free trade, and free capital movements was weakened by the rise of socialism and economic nationalism which subordinated economic life to politics, and erected economic barriers coextensive with political barriers. These politico-economic barriers required for their maintenance the development of economic life toward power rather than toward welfare.¹⁰⁹

¹⁰⁴ "In the last century you had a peace system which was the outgrowth of British experience during the Napoleonic and other previous wars (and) which prevented world war for a century. It was based on the simple truth that if the British people made their islands an invulnerable base by maintaining an invincible fleet with naval bases all over the world which would enable it to sink or drive into port any hostile fleet anywhere there would be no serious risk of world war. . . . The Pax Britannica depended on . . . a Britain which was liberal, and therefore used its power in such a way that it did not challenge the vital interests of other powers." (Lord Lothian, *International Affairs*, Vol. 18 (1939), pp. 331-332, quoted by Rushton Coulborn, in Beneš *et al.*, *International Security* (Chicago, 1939), p. 105.)

¹⁰⁵ See Bernard Brodie, *Major Naval Inventions and their Consequences in International Politics, 1814-1918* (MS. Dissertation, University of Chicago Library, 1940).

¹⁰⁶ "The British Empire as a unit is a cumbersome machine. In international relations it can only work smoothly and efficiently if its internal machinery for consultation and for exchanging information is satisfactory." (Hurst, *op. cit.*, p. 97.) See also Zimmern, *op. cit.*, p. 483 ff.

¹⁰⁷ Frederick Schuman, *International Politics* (New York, 1937), p. 64 ff.

¹⁰⁸ Zimmern, *op. cit.*, p. 90 ff.

¹⁰⁹ Walter Lippmann, *The Good Society* (New York, 1937); Zimmern, in Q. Wright (ed.), *Neutrality and Collective Security*, p. 30 ff.

All of these developments, weakening British leadership and the prestige of British ideas in the world, were accompanied by an extraordinary development of communications, travel, transport, international trade and international organization tending toward equalization of standards of living and of culture, toward an interdependence economically, socially, and politically of distant areas upon each other, and toward the development of other centers of politico-economic power equal to London. (Thus, as world organization under British hegemony declined, the need of world organization commensurate with world contacts increased, but realization of the need was obstructed by the dominance of national sovereignty over international law.¹¹⁰

By 1898 the *Pax Britannica* was seriously undermined. Britain had already given over dominance of the New World to the United States, and by the alliance with Japan in 1902 was preparing to abandon her dominance in the Far East. In both cases, however, it was expected that moderate freedom of commercial opportunity would continue in these regions. With the Balkan crisis of 1908 the inability of Britain to maintain the delicate European balance was clear.) The World War further reduced the relative position of British wealth, of British sea power, and of British political prestige in the Empire, in Europe and in the extra-European world. (It convinced British statesmen that they could no longer bear the burden of regulating world affairs alone.) (They urged a League of Nations which was to be "heir to the empires" in developing backward peoples and maintaining peace.¹¹¹

11. NEUTRALITY AND INTERNATIONAL ANARCHY

Such a transition from a hegemonic to a democratic organization of the world could only rest on a firm structure of international law, but that law

¹¹⁰ Eugene Staley, *World Economy in Transition* (New York, 1939); W. E. Rappard, *The Quest for Peace* (Cambridge, Mass., 1940); Clarence Streit, *Union Now* (New York, 1939).

¹¹¹ "The attempt to form empires or leagues of nations on the basis of inequality and the bondage and oppression of the smaller national units has failed, and the world has to be done all over again on a new basis and an enormous scale. . . . Europe is being liquidated, and the league of nations must be the heir to this great estate. . . . Surely the only statesmanlike course is to make the league of nations the reversionary in the broadest sense of these empires. In this debacle of the old Europe the league of nations is no longer an outsider or stranger, but the natural master of the house. It becomes naturally and obviously the solvent for a problem which no other means will solve." (Jan C. Smuts, Memorandum, Dec. 16, 1918, reprinted in *The Nation*, Feb. 8, 1919, Vol. 118, p. 226.) "The effort of British policy in the nineteenth century had been, if possible, to prevent war and, when this was not possible, to localize it. The war of 1914 was a contradiction of this standing principle. It was the demonstration that, as international politics had developed since the turn of the century, a war between Great Powers could no longer be compartmentalized. It was a break-through, in the grand style, of the forces of disruption, carrying away in their path barriers that had held for a hundred years. Could peace be established on an equally world-wide basis, with a sweep as majestic and all-embracing? That was the problem set for statesmanship by the events of 1914." (Zimmer, *op. cit.*, pp. 92-93.)

proved too weak to bear the load. National sovereignties were no more prepared to collaborate in a democratic world organization than they had been to submit to British domination. An international law, based upon the irresponsibility of national sovereignties manifested in the acknowledged right both to go to war and to be neutral, did not provide suitable foundations for the new order. Some states declined to assume responsibilities in the League of Nations altogether, relying on their relatively isolated positions; others accepted obligations but declined to fulfill them when confronted by serious emergencies; and still others violated their obligations and resorted to jungle methods to achieve their ambitions.¹¹²

Thus, instead of the League of Nations succeeding to the British imperial hegemony, the world fell into anarchy in a new struggle of several states, each striving to become the dominant Power. France, flushed with victory but fearful of the greater size and resources of her neighbors, sought to dominate Europe by a system of alliances. (Italy sought to revive ancient Rome. Germany sought to revive the medieval empire. Japan sought to realize the imperial ambition set forth by Premier Tanaka. The Soviet Union envisaged a Soviet-dominated, world-wide, communist confederation. Some Britishers still hoped to restore the *Pax Britannica*. Some Americans counseled abiding in isolation, qualified by control of the Americas, until the time arose for the United States to utilize its dominant control of resources, industry and finance to take up the burden which had proved too heavy for Britain.)

Perhaps each of these hegemonies has been in the realm of at least temporary possibility, but it is doubtful whether any of them could be achieved without collapsing civilization through a long period of devastating war. There seems more hope in a federal organization of the world. Such an organization must rest on an international law whose premises are consistent with each other. (In guaranteeing appropriate spheres both to the individual, to the state, and to the world community, international law must recognize that the whole is greater than the parts.) (This implies that states of war and neutrality, recognizing the power of the part through violence or indifference to invalidate the will of the whole, are by nature inconsistent with law.)¹¹³ (Such abnormal conditions can exist, not as a result of the self-determined assertion of single states or groups of states, but only as a result of general recognition of an emergency, which for the moment has put normal law into abeyance.) (The task of international law is less to regulate such conditions than to prevent their occurrence.) (A world community intent on the latter will have little use for the concept of neutrality)

¹¹² Zimmern, *op. cit.*, p. 480 ff.; Beneš, Feller and Coulborn, *International Security* (Chicago, 1939).

¹¹³ See Lauterpacht, "Neutrality and Collective Security," *Politica*, Nov., 1936; J. H. Ralston, *op. cit.*; Van Vollenhoven, *The Law of Peace*.

back

(Blasphemy)
He follows wrong
How his own hump
is an idiot of the lo
and obnoxious

AMERICAN RIGHTS IN THE PANAMA CANAL

BY NORMAN J. PADELFORD

Professor of International Law, Fletcher School of Law and Diplomacy

The return of maritime warfare in the Atlantic and Pacific, and the proclamation by the United States of its neutrality in the existing state of war, raise anew important questions of law concerning the Panama Canal. While there is an abundant literature on the history of the Canal project, on the Panama Revolution, the Tolls controversy, the economic importance of the Canal and the cost of its defense, little has been written on the legal status of the Canal as a completed and operating institution. No complete survey of the treaties, laws, executive orders, regulations, agreements, opinions and decisions, and diplomatic correspondence seems to exist.¹ Only by a laborious consultation of source materials, not all of which are easily accessible, can a comprehensive picture of the legal situation be pieced together. It is hoped that the treatment which follows may help to fill this lacuna.

(It is necessary to appreciate at the outset that the Panama Canal and the Canal Zone, while administered by the same governor, are in reality separate entities.) Some treaties, laws, orders, and regulations relate only to the Panama Canal. Others concern the Canal Zone, and have nothing to do with the waterway and its approaches. Still others concern both the Canal and the Canal Zone. Distinction needs to be made between what is being or can be done with respect to vessels or persons passing through the Canal, and what is being or can be done to persons or property in the Canal Zone but not passing through the waterway.)

(Our concern here is with the Panama Canal, and with the rights of parties having jurisdiction over it or making use of it.) We shall not examine the details of administration of the Canal Zone, nor the laws in force therein, save in so far as they bear directly upon the Canal. (We shall examine first what may be called the fundamental laws relating to American rights in the Panama Canal: the Hay-Pauncefote Treaty of 1901, the Spooner Act of 1902, the 1903 Treaty with Panama, and the Panama Constitution of 1904.) Attention may then be turned to the laws, orders, and regulations adopted and applicable to the Canal, which was opened to traffic on August 15, 1914.

¹ Two monographs touch the fringes of the subject: D. H. Smith, *The Panama Canal* (Baltimore, 1927); W. D. McCain, *The United States and the Republic of Panama* (Durham, 1937). Both of these are useful and excellent so far as they go. The Smith volume, No. 42 of the Service Monograph Series, is primarily concerned with the governance and administration of the Panama Canal from an administrative point of view. McCain's book is based upon a careful study of available diplomatic correspondence bearing upon the Canal and American-Panamanian relations. It does not go extensively into the legal situation.

These are the bases of what is. What might have been, or may yet be somewhere else, is not germane to the present discussion.²

(The Treaty facilitate the Construction of a Ship Canal, signed by Messrs. Hay and Lafont on November 18, 1901, is the cornerstone of American right the Panama Canal.³ Whatever else it may do, the United States not regulate the Panama Canal in any way affecting British interest a manner contrary to that compact, without violating one of its most important treaties.)

(It is agreed article II that as between the two contracting parties, "the canal may be constructed under the auspices of the Government of the United States directly or indirectly, and that the United States "shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal." Article III and IV, setting forth rules to be adopted as a basis for "the neutralization of such ship canal," and providing that "no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present Treaty," must be read as limitations, and as the only limitations imposed by this treaty upon "the exclusive right" of regulation and management accorded to the United States in Article II.)

(This treaty was essentially a waiver by Great Britain of a right of partnership and cooperation provided for in the Clayton-Bulwer Treaty of 1850. It was not a conference of territorial or sovereign rights; such could be obtained only from the local sovereign. Conversely, the limitations accepted by the United States were contractual only with Great Britain. Although the United States "adopts" the rule that the "canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules" (Art. III), it has never entered into any treaty or convention with any Power, excepting Great Britain and Panama, requiring it to keep the Canal free and open to the vessels of a particular state.⁴

² Reference may be made to Art. XXXV of the treaty of Dec. 12, 1846, with New Granada, which is still in force. H. Miller, *Treaties and Other International Acts of the United States of America* (Washington, 1937), Vol. V, p. 115; W. H. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers* (Washington, 1910), Vol. I, p. 302. For state papers and diplomatic correspondence bearing upon this treaty, see J. B. Moore, *Digest of International Law* (Washington, 1906), Vol. III, pp. 5-46.

See likewise Articles XIV-XVIII of the Treaty of June 21, 1867, with Nicaragua, Malloy, *op. cit.*, Vol. II, p. 1279; Protocol for the Construction of an Inter-oceanic Canal, concluded Dec. 1, 1900, *ibid.*, p. 1290; Convention Respecting a Nicaraguan Canal Route, Aug. 5, 1914, *ibid.*, Vol. III, p. 2740. For comment on 1867 treaty, see Moore, *op. cit.*, Vol. III, pp. 184-185.

³ Text in this JOURNAL, Supp., Vol. 3 (1909), p. 127; 32 U. S. Stat., pt. 2, 1903; Malloy, *op. cit.*, Vol. I, p. 782.

⁴ The Senate of the United States refused to ratify the 1900 draft treaty on the Canal containing the clause: "The High Contracting Parties will, immediately upon the exchange

⑥ The principal limitation placed upon the exclusive regulation by the United States is the adoption, "as the basis of the neutralization of such ship canal," of the Rules contained in Article III of the 1905 treaty. What was the exact nature of the limitation placed upon the United States by this article? The article states that the "neutralization" of the Rules are "substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal." While much has been said and written about the "neutralization" of the Suez Canal, the Convention of 1888 did not mention or use the terms "neutralization" or "neutralize." It provided that the Suez Canal should "always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag." It allowed defensive measures to be taken for the security of the Canal and to insure the execution of the convention, with the exception of the erection of permanent fortifications.⁵

Secretary Hay stated that "These Rules⁶ are adopted in a treaty with ratifications of this Convention, bring it to the notice of the other Powers and invite them to adhere to it." Moore, *op. cit.*, Vol. III, p. 211. Cf. Arts. XI and XIX of the treaty with Panama, *infra*.

⁵ It may be recalled that the British landed troops in Egypt in 1882 to protect the Canal against the Arabi rebels; that they expressly refused to withdraw them at the time of or after the signature of the Constantinople Convention; and that Bismarck was advised: "We can never agree to the canal being neutralized." See Halford L. Hosk, "The Suez Canal in Time of War," *Foreign Affairs*, Vol. 14 (1935), pp. 93-101.

⁶ "1. The Canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

"2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

"3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the Regulations in force, and with only such intermission as may result from the necessities of the service.

"Prizes shall be in all respects subject to the same Rules as vessels of war of the belligerents.

"4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

"5. The provisions of this Article shall apply to waters adjacent to the canal, within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

"6. The plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal." This JOURNAL, Supp., Vol. 3 (1909), p. 128; 32 U. S. Stat., pt. 2, 1903; Malloy, *op. cit.*, Vol. I, pp. 782-783.

at Britain as a consideration for getting rid of the Clayton-Bulwer treaty." ⁷ Comparison of them with the articles contained in the Convention of Constantinople reveals the truth of the phrase, "substantially as embodied in the Convention of Constantinople." ⁸

During the Tolls controversy in 1912, it was contended by the British that neutralization must refer to the system of equal rights. ⁹ Neutralization, however, is a concept additional to equality of treatment. The latter may be embodied in neutralization, but it is not all that is involved. The United States agreed that the Canal should be free and open to the vessels of all nations "on terms of entire equality, so that there shall be no discrimination . . . in respect to the conditions or charges of traffic, or otherwise." Separately and additionally, it "adopts" five sections of "Rules" relating exclusively to belligerent and neutral activities in and *vis-à-vis* the Canal. Observance of these Rules "is the condition for the privilege of using the Canal."—To that extent the system is one of "equality." As President Taft remarked:

The Article is a declaration of the policy of the United States that the Canal shall be neutral, that the attitude of this Government towards the commerce of the world is that all nations will be treated alike and no discrimination made by the United States against any one of them observing the rules adopted by the United States.¹⁰

The two propositions are separate. We agree to equality of treatment of shipping using the Canal. We also agree to the neutrality of the Canal. We further stipulate the legal status of the Canal respecting belligerency, and the attitude which belligerents shall adopt toward it.

If the Suez Canal was not "neutralized," certainly the Panama Canal was

⁷ See account of the negotiations sent to the Senate Committee on Foreign Relations, Senate Doc. No. 746, 61st Cong., 3d Sess. It may be interesting to observe that in Art. II of the draft treaty signed in 1900 the "neutralization" was definitely related to the "general principle" of neutralization laid down in Art. VIII of the Clayton-Bulwer Treaty. One cannot refrain from noting that the 1850 principle of neutralization was drafted before the British had had experience with the question in the Suez.

⁸ The first part of Sec. 1 is based upon Art. I of the Constantinople Convention, omitting the important clause—"in time of war as in time of peace." The latter half of the section is related to Art. XII, although it is made rather more specific than in the 1888 instrument. Had this portion of Sec. 1 reproduced Art. XII, the United States might have had a stronger case on the Tolls question. Sec. 2 draws upon the wording or principles of parts of Arts. I, IV, and X. The first half of Sec. 3 follows almost literally par. 2 of Art. IV, while the second part reproduces Art. VI. Sec. 4 adopts Art. V, slightly rephrased. Sec. 5 takes over parts of pars. 1 and 3 of Art. IV. Sec. 6 adopts and strengthens propositions contained in Arts. II and III. The text of the 1888 convention may be found in this JOURNAL, Supp., Vol. 3 (1909), p. 123; also in British and Foreign State Papers, Vol. 79, p. 18; in English version in Commercial No. 2, 1889, C. 5623.

⁹ Sir Edward Grey to the British Ambassador in Washington, Nov. 14, 1912. U. S. Foreign Relations, 1912, pp. 481-489.

¹⁰ Memorandum accompanying signature of the Panama Canal Act, 1912. *Ibid.*, pp. 475-480. Proceedings of Am. Soc. Int. Law, 1913, p. 324.

not. The United States did not guarantee that it should be "free and open in time of war as in time of peace," as did the parties to the Suez Canal Convention. The United States and Great Britain (together with the Republic of Panama, by virtue of the terms of the 1903 treaty), are the only parties agreeing to the so-called "neutralization" of the Panama Canal. Other states are under no treaty obligation to respect the neutrality of the Canal, or to observe the Rules set forth in the Hay-Pauncefote Treaty. The United States is not restricted in what it may do to enforce the Rules laid down in the treaty. It may add other rules and regulations. It may restrict or prohibit the transit of the Canal by belligerent vessels failing to abide by the Rules. Violation of the Rules by a state having strained relations with the United States would constitute an infraction of the law of the United States. It might be regarded as an act of war, and as a *casus belli*. It would not, however, except in the case of Great Britain, amount to a violation of treaty contract.

May the United States defend the Panama Canal against an enemy or other danger? May it erect fortifications, commanding the Canal and its approaches, for its protection? May it engage in military operations within the Canal as a part of its defense? These questions may well be the crux of the larger question of "neutralization."¹¹ The terms of the Hay-Pauncefote Treaty are largely silent on these matters, save for the last part of Section 2 of Article III. ["The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder."⁷ If the maintenance of military police is conceded, which may be represented by units of the United States Army, that must involve the right to provide the police with such equipment and supportive devices as may be necessary to insure the proper execution of their function. Lacking restrictive treaty definition of "protect it against lawlessness and disorder," the United States has exclusive right to determine what is "necessary to protect," and what constitutes "lawlessness and disorder." Obviously, this would include protection against acts violating the Rules laid down in Article III, as well as against any acts violating whatever may be involved in the "exclusive right of providing for the regulation and management of the canal."

There is no express authorization of the right of erecting fortifications or of taking measures of military defense. But, more importantly, there is no prohibition of such action, as there is in the Constantinople Convention re-

¹¹ These questions were vigorously debated in articles appearing in this JOURNAL in 1909, 1910 and 1911. See Peter C. Hains, "Neutralization of the Panama Canal," this JOURNAL, Vol. III (1909), pp. 354-394; George W. Davis, "Fortification at Panama," *ibid.*, pp. 885-909; H. S. Knapp, "The Real Status of the Panama Canal as Regards Neutralization," *ibid.*, Vol. IV (1910), pp. 314-358; Richard Olney, "Fortification of the Panama Canal," *ibid.*, Vol. V (1911), pp. 298-301; E. Wambaugh, "The Right to Fortify the Panama Canal," *ibid.*, pp. 615-619; C. Kennedy, "The Canal Fortifications and the Treaty," *ibid.*, pp. 620-638.

garding the Suez Canal. The abortive 1900 draft had contained a limitation.¹² Secretary Hay eventually persuaded the British of the American desire to omit all mention of fortifications and defense. Lord Lansdowne's Memorandum of August 3, 1901, recognized American wishes:

In the new draft the United States intimate their readiness "to adopt" somewhat similar Rules as the basis of the neutralization of the canal. It would appear to follow that the whole responsibility for upholding these Rules, and thereby maintaining the neutrality of the canal, would henceforward be assumed by the Government of the United States. The change of form is an important one, but in view of the fact that the whole cost of the construction of the canal is to be borne by that Government, which is also to be charged with such measures as may be necessary to protect it against lawlessness and disorder, His Majesty's Government are not likely to object to it.

In my despatch I pointed out the dangerous ambiguity of an instrument of which one clause permitted the adoption of defensive measures, while another prohibited the erection of fortifications. It is most important that no doubt should exist as to the intention of the Contracting Parties. As to this, I understand that by the omission of all reference to the matter of defence the United States' Government desire to reserve the power of taking measures to protect the canal, at any time when the United States may be at war, from destruction or damage at the hands of an enemy or enemies. On the other hand, I conclude that, with the above exception, there is no intention to derogate from the principles of neutrality laid down by the Rules.¹³

It may be concluded that under the Hay-Pauncefote Treaty the United States has: (1) a plenary and exclusive right to regulate and control the Canal and all shipping using it; (2) ample authority to police the Canal, and to take such measures as it alone may consider necessary to protect it against whatever it may determine to be lawlessness and disorder; (3) a conceded right as a belligerent to take any and all "measures to protect the canal from destruction or damage at the hands of an enemy or enemies";¹⁴ (4) no undertaking

¹² Sec. 7 of Art. II. Moore, *op. cit.*, Vol. III, p. 211. This had led the American Senate to insert a reservation, which the British refused to accept, asserting that none of the Rules should "apply to measures which the United States may find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order." *Ibid.* See Reports of the Committee on Foreign Relations, 1789-1901 (Washington, 1901), Vol. VIII, p. 650. It is notable that this reservation was based upon the British position regarding the defense of Egypt and the Suez Canal. *Ibid.*, p. 648. The British negotiators maintained that such a reservation "would strike at the very root of that 'general principle' of neutralization on which the Clayton-Bulwer treaty was based, and which was reaffirmed in the Convention as drafted." The Marquess of Lansdowne to Lord Pauncefote, Feb. 22, 1901. British and Foreign State Papers, Vol. XCIV, p. 483. Secretary Hay's energies were subsequently directed toward persuading the British to forego all reference to the Clayton-Bulwer "general principle of neutralization" in the text of the new treaty.

¹³ Moore, *op. cit.*, Vol. III, pp. 214, 215.

¹⁴ On Nov. 14, 1912, Sir Edward Grey wrote to the British Ambassador in Washington a note handed to the Department of State, in which he said: "Now that the United States

expressly prohibiting its fortification of the Canal in time of peace or war.

✓ If it may take "measures to protect the canal from destruction or damage at the hands of an enemy" when it is a belligerent, it certainly must be free to prepare and establish such permanent "measures" before war breaks out, ✓ in other words, in time of peace. And if it has "the whole responsibility for upholding" the Rules of "neutralization" laid down in Article III, it must have the right and authority to take any and all measures necessary therefor. It is as important that the "canal be free and open" to the vessels of all nations when the United States is at peace and when it is a neutral, as it is when the United States may be a belligerent. >

< If anything, the Panama Canal is less neutralized than is the Suez Canal.¹⁵ Although pronounced free and open to the vessels of commerce and of war of all nations on terms of equality, the Canal cannot be said to be "internationalized." It is a domestic possession of the United States, which this country agreed, in a bilateral treaty with Great Britain, and in a subsequent bilateral treaty with the Republic of Panama, to construct and to open to ✓ commerce of the world on certain conditions aimed to protect the Canal and ✓ secure equality of treatment in its use. Except as limited by treaty arrangements, the possessing state has complete and "exclusive" jurisdiction in the regulation and control of the Canal and of all vessels passing through it. ✓

✓ The second element of the fundamental law applying to the Panama Canal is the Spooner Act of June 28, 1902.¹⁶ By the terms of this Act the President was authorized to: (1) acquire for and on behalf of the United States, the rights, privileges, grants, property, plants, etc., of the New Panama Canal Company of France; (2) acquire from the Republic of Colombia (or from Costa Rica and Nicaragua if unsuccessful with Colombia), "perpetual control of a strip of land," and "the right to use and dispose of the waters thereon, and to excavate, construct, and to perpetually maintain, operate, and protect thereon a canal," together with such police, sanitary and judicial jurisdiction "as may be necessary to preserve order and preserve the public health thereon" (3) cause a ship canal "of sufficient capacity and depth" to be excavated and constructed "as shall afford convenient passage for vessels of the largest tonnage) and greatest draft now in use, and such as may be reasonably anticipated," together with the necessary locks, appliances and harbors; (4) "make such provisions for defense as may be necessary for the safety and protection of said canal and harbors"; (5) include in the treaty "a guarantee" to the said state, or states, of "the use of said canal and harbors, upon such terms as may be agreed upon, for all vessels owned by such

has become the practical sovereign of the Canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection." For. Rel., 1912, p. 486.

¹⁵ Moore, *op. cit.*, Vol. III, pp. 267-268; A. S. Hershey, *Essentials of International Law* (Rev. ed., New York, 1929), pp. 315-316.

¹⁶ 32 U. S. Stat. 481; *Treaties and Acts of Congress Relating to the Panama Canal* (Mt. Hope, 1922), pp. 30-33.

states or by citizens thereof"; (6) establish an Isthmian Canal Commission "to construct the canal and works appurtenant thereto."

This Act was essentially an enabling act, carrying with it appropriations sufficient for the acquisition of the specified rights, and for the commencement of construction. It had to be followed by the conclusion of a treaty of cession with the local sovereign in the Isthmus. The story of the negotiations with Colombia; and then with Panama has been told many times and needs no repetition here. The Convention for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, signed by Messrs. Hay and Bunau-Varilla on November 18, 1903, is the definitive legal instrument.¹⁷ The Republic of Panama was the successor in law, as well as in fact, to the Isthmus and to the rights formerly exercised in that territory by New Granada and Colombia. As such it was the only party with which the President, acting under Section 3 of the Spooner Act, could make the necessary treaty arrangements for the acquisition of the isthmian canal route which the Panama Canal Company of France had started, and which had been surveyed by United States officers.¹⁸

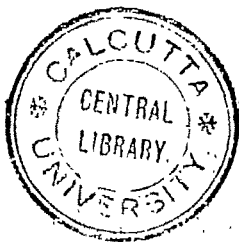
The Hay-Varilla Treaty may be said to be the third fundamental law regarding the Panama Canal. Without this treaty the United States could not have carried out the authorizations contained in the Hay-Pauncefote Treaty, and in the Spooner Act. Without it the United States could not today possess in fact or in law its jurisdiction and control over the Canal. Notwithstanding the generally known character of its provisions, no treatment of the legal status of the Panama Canal can omit careful reference to it.¹⁹

The Republic of Panama, by Article II, "grants" to the United States, "in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal," ten miles wide "beginning in the Caribbean Sea three marine miles from mean low water mark and extending to and across

¹⁷ President Theodore Roosevelt remarked in his Annual Message to Congress, Dec. 7, 1903: "When the Congress directed that we should take the Panama route under treaty with Colombia, the essence of the condition, of course, referred not to the Government which controlled that route, but to the route itself; to the territory across which the route lay, not to the name which for the moment that territory bore on the map. The purpose of the law was to authorize the President to make a treaty with the power in actual control of the Isthmus of Panama." For. Rel., 1903, p. xxxii. The Republic of Panama existed neither in fact nor in law when the Spooner Act was passed in 1902. Had it existed at that time, the contention of the President would have had less weight.

¹⁸ See President Roosevelt's Special Message to Congress, Jan. 4, 1904, For. Rel., 1904, pp. 260-278. See also Senate Doc. 230, 56th Cong., 1st Sess.; *ibid.*, 389, 56th Cong., 1st Sess.; H. Ex. Doc., 63, 46th Cong., 2nd Sess.; Senate Doc. 54, 57th Cong., 1st Sess., pts. 1 and 2; *ibid.*, 123, 57th Cong., 1st Sess. See further, *Treaties and Acts Relating to the Panama Canal*, p. 31, n. 34.

¹⁹ Text in this JOURNAL, Supp., Vol. 3 (1909), p. 130; 33 U. S. Stat., pt. 2, 2234; Malloy, *op. cit.*, Vol. II, p. 1349; *Treaties and Acts Relating to the Panama Canal*, p. 18.



the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low water mark," together with any other lands or waters outside of the zone "which may be necessary and convenient" for the purposes set forth above, or for ancillary canals or other "works necessary and convenient" to the enterprise.

It is notable that Panama did not cede, sell or lease the territory for the Canal Zone, as it did agree to do for naval or coaling stations in Article XXV.²⁰ The grant in Article II is in line with the technical retention of sovereignty indicated in Article III, of which more presently. Notwithstanding the apparently qualified nature of the transfer, the grant was "in perpetuity." That is to say, Panama contracted away "the use, occupation and control" of the zone for a period of endless time.²¹ No limitation was placed upon the duration of the grant, as it had been in the draft Hay-Herran Treaty (one hundred years). No provision was made or implied for the revocation, recapture or transfer of the grant by the Republic of Panama. Articles XXII and XXIV substantiate this, and ensure that Panama has contracted away completely any and all legal right to challenge the "exclusive" jurisdiction of the United States over the Canal and Canal Zone. By Article XXII Panama expressly renounces all right, claim and title to participation in the earnings of the Canal and railroad. It also "renounces, confirms and grants to the United States, now and hereafter," all of the rights and property formerly conceded to or made over to the New Panama Canal Company, together with "all right, title and interest which it now has or may hereafter have, in and to the lands, canal, works, property and rights held by the said companies under said concessions or otherwise, and acquired or to be acquired by the United States from or through the New Panama Canal Company." This is more than a mere usufructuary grant. The last paragraph of the article is conclusive against Panama:

The aforesaid rights and property shall be and are free and released from any present or reversionary interest or claims of Panama and the title of the United States thereto upon consummation of the contemplated purchase by the United States from the New Panama Canal Company, shall be absolute, so far as concerns the Republic of Panama, excepting always the rights of the Republic specifically assured under this treaty.

In short, while at the end of legal perpetuity Panama might conceivably reacquire the exercise of sovereignty over the territory called the Canal Zone,

²⁰ The Secretary of Foreign Affairs of Panama, Mr. Arias, writing to American Minister Barrett, July 27, 1904, did speak of the transfer as a cession; "... and the zone thus surrendered was ceded to the Government of the United States, in perpetuity." For. Rel., 1904, pp. 591-592.

²¹ The jurisdiction of Panama "ceased" upon the exchange of ratifications of the treaty. See Note from Panaman Government to General Davis, May 24, 1904, For. Rel., 1904, p. 584.

it would not thereby reacquire right or title to the lands, property, works, and, particularly, the Canal.²²

Article XXIV adds further force to the finite character of the transfer:

No change either in the Government or in the laws and treaties of the Republic of Panama shall, without the consent of the United States, affect any right of the United States under the present convention, or under any treaty stipulation between the two countries that now exists or may hereafter exist touching the subject matter of this convention.

If the Republic of Panama shall hereafter enter as a constituent into any other Government or into any union or confederation of states, so as to merge her sovereignty or independence in such Government, union or confederation, the rights of the United States under this convention shall not be in any respect lessened or impaired.

If this grant was thus unlimited in point of time, its purpose was nevertheless carefully defined. The Panaman Government did not grant the *territory* in perpetuity. It granted "the use, occupation and control" of the territory.²³ And it did so for certain specified ends: "for the construction, maintenance, operation, sanitation and protection of said canal. . . ." Controversy existed between the Republic of Panama and the United States Government from 1904 to 1936 over the question of whether the United States might engage in activities in the Canal Zone which were only very indirectly connected with the "construction, maintenance, operation, sanitation and protection of said canal."²⁴ Secretary of State Hay thus enunciated the position of the United States, which has been adhered to since: "The position of the United States is that the words 'for the construction, maintenance, operation, sanitation and protection of the said canal' were not intended as a limitation on the grant but are a declaration of the inducement prompting the Republic of Panama to make the grant." Asserting that the great object of the United States was to construct and operate the Canal, he added that the right to exercise sovereignty, conferred by Article III, left the United States exclusive right to determine what things should be done in the zone ancillary to the main objective.²⁵ The establishment

²² If it be argued that the "canal" acquired by the United States is not the canal which the United States constructed and now operates, it may be replied that the Panama Canal is but the completion of the canal which was already begun when the United States purchased the concession.

²³ Panama accepted a permanent servitude. F. A. Vali, *Servitudes in International Law* (London, 1933), pp. 204-205.

²⁴ This involved questions of the application of the United States tariff; the establishment of customs houses; the construction and operation of hotels, stores, motion picture houses; the sale of provisions and supplies to vessels, etc. See various notes of the Panaman Secretary for Foreign Affairs, Mr. Arias, to American Minister Barrett, and of Panaman Minister de Obaldia to Secretary Hay: For. Rel., 1904, pp. 587-613. The same points were argued extensively in 1923 between Minister Alfaro and Secretary Hughes. See For. Rel., 1923, Vol. II, pp. 638-687. For excellent résumé and account of these problems, see McCain, *op. cit.*, pp. 23-47, 225-241.

²⁵ For. Rel., 1904, pp. 613-630. This position was strongly sustained by Secretary Hughes in 1923. *Ibid.*, 1923, Vol. II, pp. 652-653.

of services in the Canal Zone not directly related to the work of the Canal may infringe the spirit of the treaty, but it gives Panama no legal right to revoke the grant or to reassume occupation and control of the zone, so long as the United States continues to employ the Canal Zone in other respects for the operation, maintenance, etc., of the Canal. 17/6/59 ✓

Article III has been regarded by the United States as a keystone in the structure of its rights in the Panama Canal and Canal Zone. By this article,

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority. ✓

As early as August 11, 1904, representatives of the Government of Panama contested the scope of American authority under this article.²⁶ It was maintained that the United States was merely in the position of a private lessee; that Panama had not relinquished dominion and sovereignty over the zone; that the sovereignty was exercisable conjointly; and that any rights not specifically contracted away remained in the full power of Panama.²⁷ All contentions of this nature have been forthrightly refuted by the United States, to the extent that they deny, or appear to do so, the right freely to exercise sovereign powers within the zone. Secretary Hay, in the note to Señor de Obaldia already quoted above, insisted that the United States "cannot concede the question to be open for discussion or the Republic of Panama to possess the right to challenge such exercise of authority," and he laid much weight upon the words of Article III: "to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights."²⁸ ✓

²⁶ Señor de Obaldia to Secretary Hay, For. Rel., 1904, p. 598 *et seq.*

²⁷ Minister Alfaro renewed the arguments in his letter to Secretary Hughes, dated January 3, 1923. The Minister asserted:

"It is proper to remark that the zone has not been sold, transferred, or alienated by the Republic of Panama to the United States in full ownership. That which was ceded is the use, occupation, and control of the zone for the specific needs of the construction, conservation, operation, sanitation, and protection of the Canal. If the Canal were abandoned by the United States, the United States would have no legal ground for occupying the zone, title to which it has not acquired either by purchase, transfer, or conquest. Further, the Canal Zone has not been even leased to the United States because the annual payment of two hundred and fifty thousand dollars which it undertook to make under the Canal treaty was not stipulated as a fee for the use of the zone." For. Rel., 1923, Vol. II, pp. 645-646. See also Memorandum of a Conversation, Dec. 15, 1923, *ibid.*, pp. 682-683. For a general account of the controversy at this time, see McCain, *op. cit.*, pp. 225-241.

²⁸ Secretary Hughes reiterated this in 1923: "The grant to the United States of all the rights, power and authority which it would possess if it were sovereign of the territory described, and to the entire exclusion of the exercise by Panama of any such sovereign authority, is conclusive upon the question you raise. The position of this Government upon this point

At length, in 1923, the Panaman Minister, in a conversation with Secretary Hughes, "said that the position taken by the Secretary might be sound from a technical, legal standpoint."²⁹

The United States, while insisting that it possesses all of the rights to exercise sovereignty, has not contested that titular and fictional sovereignty continues to reside in the Republic of Panama.³⁰ The dicta of courts in two well-known cases may be cited with further reference to the American position. In Canal Zone v. Christian, the Supreme Court of the Canal Zone said: "The words granting 'in perpetuity the use, occupation and control

was clearly and definitely set forth in the note of Mr. Hay to Mr. de Obaldia of October 24, 1904." For. Rel., 1923, Vol. II, pp. 638, 653 *et seq.* In conversation Secretary Hughes said: "This Government would never recede from the position which it had taken in the note of Secretary Hay in 1904. This Government could not and would not enter into any discussion affecting its full right to deal with the Canal Zone under Article III of the Treaty of 1903 as if it were the sovereign of the Canal Zone and to the exclusion of any sovereign rights or authority on the part of Panama . . . This must be regarded as ending the discussion of that matter." *Ibid.*, p. 684.

Cf. the citation of J. N. Gris v. The New Panama Canal Co., Supreme Court of Panama, in Secretary Hughes' note of Oct. 15, 1923, quoted above, in which that Court said: "The Republic of Panama agreed that the United States should possess and exercise, to the entire exclusion of the Republic, those rights, powers and authority, that is to say, the rights, power and authority that a sovereign alone can have . . ." *Ibid.*, p. 656.

In a note dated Oct. 13, 1923, the Secretary refused to agree to arbitrate "any question attacking the exercise of sovereign rights of the United States explicitly granted under Article III of the Treaty of 1903 with Panama." *Ibid.*, p. 710.

²⁹ *Ibid.*, p. 685.

³⁰ The statement of Secretary Taft before the Committee on Inter-oceanic Canals, April 18, 1906, is pertinent to this distinction:

"It (Article III) is peculiar in not conferring sovereignty directly upon the United States, but giving to the United States the powers which it would have if it were sovereign. This gives rise to the obvious implication that a mere titular sovereignty is reserved in the Panamanian Government. Now, I agree that to the Anglo-Saxon mind a titular sovereignty is like what Governor Allen, of Ohio, once characterized as a 'barren reality' but to the Spanish or Latin mind poetic and sentimental, enjoying the intellectual refinements, and dwelling much on names and forms it is by no means unimportant. Therefore, when the question of the form of stamp was to be determined, I had not the slightest hesitation in yielding to the view that we should adopt the system which for a time General Davis had himself adopted before he got United States stamps, of merely purchasing the Panamanian stamps and crossing them with the words 'Canal Zone'.

"The truth is that while we have all the attributes of sovereignty necessary in the construction, maintenance, and protection of the canal, the very form in which these attributes are conferred in the treaty seems to preserve the titular sovereignty over the Canal Zone in the Republic of Panama, and as we have conceded to us complete judicial and police power and control over the zone and the two ports at the end of the canal, I can see no reason for creating a resentment on the part of the people of the Isthmus by quarreling over that which is dear to them but which to us is of no real moment whatever." Hearings, pp. 2527, 2399.

Mr. Woolsey, in a succinct editorial comment in this JOURNAL, Vol. 20 (1926), p. 117, entitled, "The Sovereignty of the Panama Canal Zone", remarks: "There remains a scintilla of sovereignty—a reversionary sovereignty still in the Republic of Panama."

of a zone of land' to a sovereign power carry with them by implication the right, power and authority to establish and maintain all needful and necessary forms of government." "It was clearly the intention of the High Contracting Parties, expressed in unequivocal language, that the United States should have absolute, unqualified and unquestioned control over the zone mentioned, free from any debts, liabilities, concessions or privileges whatsoever."²¹ The Supreme Court of the United States in *Wilson v. Shaw* concluded that "any contention of imperfection of title of the United States to the Canal Zone was hypercritical."²² With this the matter may be left. The United States has adequate title and *majestas* to support the enactment and enforcement of all laws, orders, regulations and rules necessary for the maintenance, operation, sanitation and protection of the Canal and of the Zone, and to govern the conduct of all persons and property located therein or passing therethrough.

Articles IX, XI, XIII, XIV, XVI, and XIX contain undertakings on the part of the United States toward Panama. Would the failure of the United States to honor these agreements cancel the right to the Canal Zone? This question may be tested best by reference to Article XIV. That article stipulates that "as the price or compensation for the rights, powers and privileges granted in this convention," the United States "agrees to pay to the Republic of Panama" the sum of ten million dollars on ratification, "and also an annual payment during the life of this Convention" of two hundred and fifty thousand dollars in gold coin of the United States. Is the continued "use, occupation and control" of the Canal and the Canal Zone contingent upon payment of the annual fund?²³ The answer would prop-

²¹ Canal Zone Supreme Court Reports, Vol. I, pp. 3-4. See also *Government v. Diaz*, *ibid.*, Vol. III, p. 465, and *Dixon v. Goethals*, *ibid.*, p. 23.

²² 204 U. S. 24. By the Act of Feb. 27, 1909 (35 Stat. 658), Congress authorized the President "to grant leases of the public lands . . . of the United States within the Canal Zone" for limited periods of time and purposes. *Treaties and Acts, op. cit.*, p. 51. All such leases would have lacked full legal foundation if the United States had been lacking in adequate title in its own right. Sec. 2 of the Act provided for procurement of all leased land whenever the United States found it necessary. Sec. 3 of the Panama Canal Act of 1912 fortified the Government's claim upon all land covered by the treaty by providing that the President might declare all land within the Zone necessary for Canal purposes. This was done, by Executive Order on Dec. 5, 1912. *Executive Orders Relating to the Panama Canal Zone (1904-1921)* (Mt. Hope, 1922), p. 132.

²³ In *Canal Zone v. Coulson*, the Supreme Court of the Canal Zone said: "It is apparent from an examination of the Treaty that the United States is not the owner in fee of the Canal Zone, but has the use, occupation and control of the same in perpetuity so long as they comply with the terms of the Treaty, and pay \$250,000 in gold coin of the United States of America per annum to the Republic of Panama." *Canal Zone Sup. Ct. Rep.*, Vol. I, pp. 54-55. Following the abandonment of the gold standard by the United States in 1933, a serious disagreement arose between the United States and Panaman Government concerning the obligation of the United States to continue paying the annuities in "standard gold coin of the United States of America." Dept. of State Press Releases, March 2, 1926. Agreement was finally reached in the 1936 treaty, Art. VII, that beginning with the 1934

erly seem to be no. ⁷⁵³ The grant of the use, occupation and control of the Zone was "in perpetuity." Payments, according to Article XIV, are compulsory "during the life of this Convention," not in perpetuity, not for so long as the United States shall continue to use, occupy or control the said Zone. The third paragraph of Article XIV is far-reaching in its significance. "No delay or difference of opinion under this Article or any other provision of this Treaty shall affect or interrupt the full operation and effect of this Convention in all other respects." Payments may be withheld over a long period of years, the United States may refuse to accord to Panama rights and privileges set forth in Articles IX, XI, XIII, XVI, and XIX, but the possession and control of the Canal Zone by the United States shall continue unaffected. Panama contracted away completely all right, title, interest and jurisdiction to and over the Canal. ||

The rights and powers conferred upon the United States by other articles of the treaty of 1903 follow in secondary importance after Articles II, III, XXII and XXIV. Article IV gives the United States the right to use other bodies of water in Panaman territory for purposes connected with the Canal, and supplements and extends a grant of right to acquire and use lands outside of the Zone, provided for in Article II.³⁴ Article V is important in giving the United States "in perpetuity a monopoly . . . of any system of communication by means of canal or railroad" across the territory of Panama between the two oceans.³⁵ No other nation or company may be allowed by Panama to establish a canal or railroad competing with the Panama Canal and the Panama Railroad Company. ²⁴³ Even the Government of Panama is precluded from constructing and operating such in its own domain. It may of course build and operate railroads and canals which do not provide an interoceanic route. May Panama establish an automobile highway extending from the Atlantic to Pacific shores? Until 1936 the United States discouraged or blocked all efforts to construct such a highway.³⁶ May Panama establish, operate or sanction the operation by others of an aeronautical service across the Isthmus or across its territory? This has been a most delicate question. While the United States has rigorously controlled all air navigation above the Canal and the Canal Zone,³⁷ it has not actually had a

payment, the annuity was to be calculated in balboas, and the United States was to pay in any coin or currency having a sum value equal to 430,000 balboas in Panaman currency. Text in Congressional Record, July 24, 1939, p. 13768 *et seq.*

³⁴ Long and bitter disputes have persisted over the implications and applications of these articles by the Canal Zone officials. They are admirably summarized in McCain, *op. cit.*, pp. 144-161. The treaty of 1936 was designed to set at rest some of the disagreements.

³⁵ Cf. Art. XX which further supplements and guarantees the monopoly acquired and assured to the United States.

³⁶ McCain, *op. cit.*, pp. 180-183 and references.

³⁷ Rules and Regulations, Nov. 13, 1914, forbade aircraft to ascend from, fly over, or descend in the Canal Zone. Annual Report of the Governor of the Panama Canal, 1915, pp. 545-547. The 1926 Air Commerce Act, Sec. 178, asserted the United States had com-

42
25
19

governmental monopoly upon such flight or transportation outside of the Canal Zone.³⁸ In 1929, however, it reached an agreement with the Government of Panama, whereby both countries adopted identical flight regulations and Panama passed a law creating an Aviation Commission to supervise all aviation in and over Panaman territory composed of three Panaman officers and three United States officers.³⁹

Article VII gives the United States the "right to acquire by purchase or by the exercise of the right of eminent domain," lands and property in the vicinity of the cities of Colon and Panama for purposes connected with the construction, operation, sanitation or protection of the Canal.

Article IX provides that neither party shall impose customs charges, tolls, dues or other charges at the "ports" and "the waters thereof" upon vessels transiting the Canal, or belonging to the United States and on Canal duty. This does not prejudice, however, the imposition by the United States of tolls and other charges "for the use of the Canal and other works." Nor does it estop the levying of dues by Panama upon goods destined for introduction into the Republic of Panama (including the cities of Panama and Colon). Entry of the ports, for purposes other than direct passage of the Canal warrants the assessment and collection of port charges, except, as provided in Article XVIII, where vessels put in for refuge in case of distress. Nothing is said in Article IX about the right of the United States to collect customs duties upon goods imported into the Canal Zone. The United States has maintained a right to do so from the beginning, and justified it under Article III.⁴⁰ Article X supports Article III, in freeing the Canal Zone, the Canal, and all property, equipment, vessels and persons connected with the Canal in any way, from taxation and charges by the Government of Panama, while Article XXI averts all pre-treaty claims on the Canal Zone and Canal. Article XII adds to the exemption by providing that Panama shall not hinder persons employed by the Canal or by the United States Government from proceeding to and from their work, and shall not exact military service from them. Article XIII provides that Panama will not subject to customs duties articles introduced into the Canal Zone for purposes connected with the Canal operations, or for the needs or use of persons residing there. The United States agrees that if any such articles are disposed of for use outside of the Zone, they shall be subject to Panaman

plete sovereignty over the airspace above the Canal Zone, and forbade aircraft belonging to foreign armed forces to navigate therein without special authorization. Canal Zone Code, p. 1009. Feb. 18, 1929, President Coolidge, in Exec. Order No. 5047, declared the Panama Canal Zone to be a "military airspace reservation," and defined the rules for operations therein and thereover. This JOURNAL, Supp., Vol. 23 (1929), pp. 121-123. Detailed regulations were issued by the Secretary of State Feb. 26, 1929. *Ibid.*, pp. 123-133.

³⁸ Commercial flights across Panaman territory began early in 1929. McCain, *op. cit.*, pp. 183-185.

³⁹ Bulletin of the Pan American Union, Vol. LXIII (1929), pp. 723, 833-834, 1267.

⁴⁰ See For. Rel., 1904, pp. 585-644; *ibid.*, 1923, Vol. II, pp. 638-687.

duties. The Taft Agreement of 1904 and an Executive Order of January 7, 1905, interpreted this article, and governed the matter until 1923.⁴¹ Articles VI and XV provide for a Joint Commission for the determination of claims based upon appraisals and condemnations of property required for Canal purposes.⁴² Article XVI lays the basis for an accord upon the detention and rendition of fugitives from justice.⁴³ ✓ "✓"

Article XVIII of the treaty is related to Article III of the Hay-Pauncefote Treaty, although markedly different in language. This states:

The Canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of Article Three of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.

The Hay-Pauncefote Treaty did not provide that the Canal "shall be neutral in perpetuity." It provided that the United States "adopts" certain Rules "as the basis of the neutralization of such ship canal." No perpetuity is provided for in the Rules included in the Hay-Pauncefote Treaty. They are binding upon the United States and Great Britain only for the duration of that treaty. Did the United States accept in 1903 a status for the Canal which it had objected to in 1900? Is the United States bound to keep the Canal "neutral in perpetuity . . . in conformity with all the stipulations" of the British treaty after the termination of that compact? Is it estopped from arranging new Rules, either with Britain or with any third state? Article XVIII is pregnant with implications.

The precise wording and punctuation of Article XVIII carries meaning in itself. The "Canal . . . shall be neutral in perpetuity," is one thing; "and shall be opened upon the terms . . . , and in conformity with . . . ," is another thing. The implication is that while the United States must open the Canal on the basis of the Hay-Pauncefote Rules, it may at a later time change them, but it cannot act in such a way as to render the Canal anything other than "neutral in perpetuity."⁴⁴ Incorporated in the treaty with Panama, that is to say, with the local *de jure* sovereign of the Isthmus, this limitation has greater significance than it would have had were it embodied in the treaty with Britain, but not in the treaty with Panama. The lan-

⁴¹ This will be dealt with subsequently.

⁴² This Commission was dissolved March 10, 1920. *Treaties and Acts Relating to the Panama Canal*, p. 19 n.

⁴³ Executive Order of the Governor of the Canal Zone of Sept. 19, 1906, and Decree No. 118 of the President of Panama of Sept. 22, 1906, established the details of the arrangement. Annual Report of the Governor, 1906, pp. 75-79. Sec. 12 of the Panama Canal Act of 1912 extended the United States extradition laws to the Canal Zone. See also Extradition Treaty, United States-Panama, May 25, 1904, Malloy, *op. cit.*, Vol. II, p. 1357.

⁴⁴ Art. XXV emphasizes the permanently neutral character of the enterprise: "For the better performance of the engagements of this convention and to the end of the efficient protection of the Canal and the preservation of its neutrality . . ."

guage of the treaty conveys the impression that the United States must keep the Panama Canal "neutral," even when it may itself be a belligerent, and notwithstanding the fact that it has jurisdiction over the Canal and Canal Zone as "if it were the sovereign of the territory." Panama granted to the United States valuable concessions and rights. This restriction would appear to have been a part of the price paid, and to be more limiting upon the United States than the provisions of Article III of the Hay-Pauncefote Treaty.⁴⁶ However, it would not be logical to construe Article XVIII to mean that the United States cannot prevent enemy vessels from entering and using the Canal for the destruction of the same or of American property located in the Canal Zone.

Article XXIII of the Panama treaty confers upon the United States a right which was sought in the negotiations with the British, but which was finally settled with them upon the basis of an agreed treaty-silence.

If it should become necessary at any time to employ the armed forces for the safety or protection of the Canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes.

Conceded by the local sovereign granting the use, occupation and control of the Zone, this provision carries greater weight than if it had been contained in the British treaty but omitted from the Panama treaty. This article leaves no doubt as to the right of the United States to police the Canal, to use authority and force to compel obedience to the Rules and regulations governing the use of the Canal, to defend and protect the Canal by its armed forces and by the erection in time of peace as well as in time of war of fortifications.⁴⁶ There would seem to be no prohibition against the United States' using the Canal for purposes of its own national defense whenever it may be neutral or belligerent, provided it leaves the Canal "neutral." There does remain a doubt as to whether the United States can close the Canal, *eo nomine*, to its enemies when it is itself at war.⁴⁷ Doubtless it can effect the desired result by administrative action, by fortification, and by naval and aerial defense beyond the confines of the Canal.

⁴⁶ Attention may be called to an odd aspect of the drafting of Art. XVIII, which may or may not be of some significance. It is provided that the Canal shall be opened upon the terms provided for by Sec. 1 of Art. III of the 1901 treaty. No mention is made of Secs. 2-6 of Art. III. However, Art. XVIII continues: "and in conformity with all the stipulations" of the treaty. If the Canal is to be opened in conformity with all the stipulations of the treaty, does that not include Secs. 2-6 of Art. III? It has never been admitted by the United States that Secs. 2-6 are servitudes upon itself. From this point of view, the omission of reference to these sections of the Rules may be important.

⁴⁶ See also Art. XXV.

⁴⁷ *Quaere*: Would the Canal Zone and Canal revert to Panama if the United States closed the Canal and no longer continued its operation, maintenance or sanitation? The treatment of the Canal by the United States during the World War will be examined in a succeeding issue of the JOURNAL.

Articles XI and XIX assure to Panama that the Canal and Canal Zone will not be a danger to its national and internal security by preventing the government from moving troops or materials of war from one part of the country to another when need arises.⁴⁸

Finally, reference may be made to Article XXV which serves to tie together the protective-jurisdictional rights of the United States. "For the better performance of the engagements of this convention and to the end of the efficient protection of the Canal and the preservation of its neutrality," Panama agrees to "sell or lease" naval and coaling-station lands to the United States.

It may be concluded that by virtue of the treaty with Panama the United States has: (1) complete and irrevocable title to the Panama Canal and to all property, land and works relating to the Canal and its operation, maintenance and sanitation; (2) a right to exercise sovereignty over the Canal and the Canal Zone; (3) permission to acquire such additional territory as may be needed for the purposes of the Canal; (4) exclusive and absolute authority in and over the Canal and over all vessels using the Canal, subject to the limitations of equality of treatment, to the Rules forming the "basis of neutralization," and to a right of passage of Panaman troops and war materials; (5) a mandate for the erection of such fortifications and for the execution of such measures of armed defense, in peace as well as in war, as the United States acting alone may see fit to undertake.

✓ The Panama treaty amply complements the Hay-Pauncefote Treaty, and affords a wide foundation for the legislative and executive action of the United States Government. If it be said that the Hay-Pauncefote and Hay-Varilla treaties are grants of limited power and that the United States must find in the treaties authority for every right which it claims to exercise and for every function performed, it must be admitted that the draftsmen drew on broad lines. An examination of practice since 1903 will reveal the sufficiency, or otherwise, of the powers conferred.⁴⁹

These three legal instruments now examined provide a triangular base of authority for the United States Government in the Isthmus of Panama. The treaty with Great Britain, the world's most powerful maritime state, gave the United States a free hand in the construction of the Canal, and assurance of non-molestation in its operation and control, given observance by the United States of certain agreed principles. Congressional authority for the acquisition, construction, operation and maintenance of the Canal was established by the Spooner Act. The conventional contract with Panama made over to the United States in perpetuity rights, property, jurisdiction and full privileges, expressly protected against legal claim or title to revocation or recapture. This is a sound and solid structure of legal rights.

⁴⁸ Sec. 6 of the Spooner Act authorized the President to make such concessions and guarantees to Panama.

⁴⁹ The 1936 treaty, superseding certain parts of the 1903 treaty, will be considered later.

Although something might have been gained by the conclusion of a multilateral convention pledging all maritime Powers to respect American rights and to observe the Rules forming the "basis of neutralization," something else, freedom of action, might well have been lost by the United States. Twenty-six years of operation and control of the Panama Canal provide an increasingly sure prescriptive right and title under general international law. Its own right arm assures the United States that these rights will stand.

One more fundamental legal instrument remains to be noted before we proceed to consider American practice and law regarding the construction, operation and maintenance of the Canal. The Constitution of the Republic of Panama, adopted February 13, 1904, contains two articles germane to American rights in the Panama Canal. Article 3 provides:

The territory of the Republic remains subject to the jurisdictional limitations stipulated or which may be stipulated in public treaties concluded with the United States of North America for the construction, maintenance, or sanitation of any means of interoceanic transit.⁵⁰

This affords the United States a desirable and additional protection for the rights, privileges and property conveyed to it by the 1903 treaty. Should the Panaman executive or legislature denounce or unilaterally abrogate the 1903 treaty, the United States' rights and jurisdiction would still remain legally unimpaired, for it will be noted that the language of the Constitution subjects Panama territory "to the limitations . . . stipulated . . . in public treaties concluded . . . with the United States . . ." It does not read: "subject to the limitations stipulated in the public treaties which are in force." That would have been less favorable to the United States' position. As it is, it would be necessary to amend the organic law of the Republic of Panama, as well as to terminate the treaty of November 18, 1903, to wipe out from the Panaman side the juridical foundation of American rights in the Isthmus. Assuming that constitutional methods were followed, this would involve a more difficult procedure than mere legislative repeal or executive decree.⁵¹

Article 136 of the Constitution likewise redounds to the benefit of the United States, giving it the extraordinary right of intervention in the internal affairs of the Republic:

The Government of the United States of America may intervene in any part of the Republic of Panama to re-establish public peace and constitutional order in the event of their being disturbed, provided that that nation shall, by public treaty, assume or have assumed the ob-

⁵⁰ Text in U. S. For. Rel., 1904, p. 562. A slightly different version appears in *Les Constitutions Modernes*, edited by J. Delpech and J. Laferrière (4th ed., Paris, 1932), Vol. IV, p. 260.

⁵¹ It would be interesting to know who was responsible for the insertion of this paragraph into the Constitution of Panama. No published correspondence, documents, or biographies reveal the unseen hand.

ligation of guaranteeing the independence and sovereignty of this Republic.⁵²

This exceptional, and carefully hedged right of United States intervention was rendered operative by the coming into force of Article I of the Treaty of November 18, 1903, which provided that "The United States guarantees and will maintain the independence of the Republic of Panama."^{52a} From an early date the United States made it clear that its right of intervention would be used circumspectly.⁵³ This appears to have been carried

⁵² U. S. For. Rel., 1904, p. 578.

^{52a} This JOURNAL, Supp., Vol. 3 (1909), p. 130; Malloy, *op. cit.*, Vol. II, p. 1349.

⁵³ Secretary of War Taft, in his conference with Panama officials on Nov. 28, 1904, said: "Now, that I may make myself plain: With the present Government, with President Amador and these gentlemen as his advisers, it might very well be that we should allow to lie dormant the exercise of powers that in case of the election of a Government whose personnel would not be so friendly to the United States we might have to use, and thus to protect our construction and maintenance and control of the Canal by the exercise of greater powers than those we desire not to exercise." For. Rel., 1923, Vol. II, p. 681.

The position was stated in greater detail in a letter addressed to the Secretary of War by Mr. Root, Secretary of State, on Feb. 21, 1906, in response to the receipt by the Department of State of a memorial from the Liberal Party in Panama soliciting the intervention of the United States in the approaching national elections. Mr. Root dealt with the matter from a broad point of view. He stated that while the United States does not propose to interfere with the independence of the Republic, and while it is its desire to maintain an attitude of impartiality between contesting parties, it is interested in seeing "a fair, free, and honest election in Panama, because it considers such an election necessary to the peace and prosperity of the country and the stability of its Government." No doubt was left that in Panama, Colon and the Canal Zone, the United States "will not permit any interference with the peace and order."

Furthermore, he said: "If circumstances require that a military force of the United States be sent into foreign territory and there enforce the rights of this nation by force of arms, such proceeding would be an act of war, unless assented to by the nation exercising sovereignty over said territory. In the instance of Panama the constitutional provision above quoted supplies the necessary assent provided the injury anticipated results from disturbance of the public peace and constitutional order. . . . The construction of the Isthmian Canal is . . . a national endeavor of the United States, and measures which interfere with that work and are calculated to obstruct, hinder, or delay its accomplishment are interferences with the rights and privileges of the United States and must be dealt with accordingly . . ." *Ibid.*, 1906, Pt. II, pp. 1203-1206.

An Instruction drawn up by the Secretary of War and sent to the American Minister at Panama on April 26, 1906, expressed the policy of the government even more clearly. Referring to Mr. Root's note, copy of which had been sent as an Instruction to the Minister, Secretary Taft said that this "did not mean at all to circumscribe the powers of action of the United States in case an insurrection in the Republic of Panama anywhere threatened danger to the interests of the United States in building the canal, or to its property in the Canal Zone. The question whether such interference ought to take place he characterizes as a military question, and one to be determined by the knowledge of conditions on the Isthmus and the practical effect that the insurrection would have on the building of the canal. I have no hesitation whatever in saying that in my judgment an insurrection in any part of the Republic would disturb the order in Panama and Colon and adjacent territory, and would greatly increase the difficulties that the United States would have in constructing the canal; and

out.⁵⁴ While the Canal has suffered no material damage on account of a disturbance in Panama, nevertheless, the right to intervene within the Republic has been a valuable adjunct to the treaty guarantee, and to the adequate protection of the Canal in time of stress or emergency. //

In 1933 the United States and Panama signed, and later ratified, the multilateral Convention on the Rights and Duties of States, Article 8 of which provides that "No state has the right to intervene in the internal or external affairs of another."⁵⁵ In 1936 both states joined in the Additional Protocol of Non-Intervention signed at Buenos Aires, in which all parties "declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties."⁵⁶ What is the effect of the ratification of these agreements upon the right of the United States to intervene in Panama under the Constitution of Panama?

An examination of the Proceedings and Minutes of the Conferences fails to reveal any statement by the delegates of Panama or of the United States bearing directly upon the point. One can only infer that as a matter of policy the United States did not intend to intervene in any country during the Roosevelt Administration.⁵⁷ Intention as a matter of policy is not al-

while, of course, the forces of our Government ought not to intervene until it is established that the Republic of Panama can not maintain order in its own territory, I think the United States may properly, under the clauses of the treaty construed in the light of the provision of the constitution of Panama, quoted by the Secretary of State, and to prevent its inevitable interference with the work of canal construction, suppress any insurrection in any part of the Republic." *Ibid.*, pp. 1206-1207.

Secretary of State Frank B. Kellogg advised the Panama authorities in 1927 that these notes continued to express the policy of the United States. Dept. of State Press Releases, Dec. 23, 1927.

⁵⁴ The instances of intervention are discussed in McCain, *op. cit.*, pp. 62-96.

⁵⁵ This JOURNAL, Supp., Vol. 28 (1934), p. 75; U. S. Treaty Series, No. 881; Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States and Other Powers, Vol. IV (Sen. Doc. No. 134, 75th Cong., 3d Sess., Washington, 1938), p. 4807.

⁵⁶ This JOURNAL, Supp., Vol. 31 (1937), p. 57; U. S. Treaty Series, No. 923; Treaties, Conventions, etc., *op. cit.*, Vol. IV, p. 4821.

⁵⁷ Secretary of State Hull declared at the Montevideo Conference, anent the Convention on the Rights and Duties of States, "... under the Roosevelt Administration the United States Government is as much opposed as any other Government to interference with the freedom, the sovereignty, or other internal affairs or processes of the governments of other nations." This declaration was made as a reservation to the convention, with particular reference to the article on non-intervention, and was made a formal part of the ratification by the United States Government. Further on in the reservation it is said that: "it is unfortunate that during the brief period of this Conference there is apparently not time within which to prepare interpretations and definitions of these fundamental terms . . ." Mr. Hull may have had in mind the American right in Panama, but this cannot be asserted as a truth.

The Reports of the Committee on Foreign Relations of the United States Senate regarding the ratification of the Montevideo and Buenos Aires instruments make no mention of the matter. The only place where anything germane appears is in the Report of the Com-

ways or necessarily synonymous with action as of legal right. The right of the United States to intervene in Panama for the reestablishment of domestic tranquillity and constitutional order is not a treaty right.⁵⁸ Hence, it is not a question of reconciling a later and an earlier treaty. It is a problem of resolving a conflict, real or apparent, between something specially permitted by the supreme law (in conjunction with a bilateral treaty arrangement) of one country to the government of another country and something prohibited by a multilateral and general international agreement adhered to by both countries. Panama has, by her supreme, constitutional law, authorized intervention by the United States; she has declared intervention to be inadmissible by virtue of a protocol. The United States enjoys a unilaterally established right to intervene in Panama; it has ratified an international convention in which it has agreed that it does not have a "right" to intervene in any American Republic.

Articles 3 and 136 of the Panama Constitution limit the freedom of action and the treaty-making power of the Government of Panama.⁵⁹ Interna-

mittee on the General Treaty of Friendship and Coöperation of 1936 with Panama. There appear the following paragraphs:

"In addition to the desirability of expanding the base of the existing convention to require greater responsibilities from Panama as well as of omitting various provisions that are no longer necessary, certain changes in the convention would seem required to harmonize with our national policy. The provisions of articles I and VII of the convention of 1903 mentioned above were considered by the Executive to be inconsistent with the aspirations of Panama, which the subcommittee considers natural and legitimate, to remove limitations upon its sovereignty, as well as with the present foreign policy of our Government. The announced policy of the United States is one opposed to intervention in the internal affairs of other nations, and it will be recalled that the Senate has given its consent to a convention on the rights and duties of States adopted at the Inter-American Conference at Montevideo on December 26, 1933, which provides in article VIII that 'No state has the right to intervene in the internal or external affairs of another.'

"However, it should be noted that in the event of emergencies which might require prompt action by the United States to safeguard the Canal against aggression or even against a threat of aggression, such action may be taken immediately under article X of the general treaty. Mention is again made of the full understanding of the Panamanian Government that under such emergency conditions 'consultation' may necessarily have to follow rather than precede the taking of action." Senate, Executive Report, No. 5, 76th Cong., 1st Sess., p. 5.

⁵⁸ Attention may be called, however, to Art. XXIII of the 1903 treaty which authorizes the United States to use its armed forces for the protection of the Canal. The article reads: "If it should become necessary at any time to employ armed forces for the safety or protection of the Canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes." This gives the United States a right to use armed force in relation to the Canal and its ancillary works. It is conceivable that this may involve the use of armed force within Panaman jurisdiction. The purpose for which armed force may be used under this article is different from the purpose for which it may be used under the 138th Article of the Constitution.

⁵⁹ The treaty-making power in Panama is vested by the Constitution in the President, by and with the approval or disapproval of the National Assembly. Arts. 65, par. 5, and 73, par.

tional law recognizes that the power of a state to contract international obligations may be restricted or impaired by special provisions in its constitution or on account of special arrangements with other states.⁶⁰ Agreements entered into by a limited treaty-making power must be presumed to be subject to the limitations placed upon that power. While the Permanent Court of International Justice has stated that provisions of municipal law cannot prevail internationally over those of a treaty which that state has concluded,⁶¹ the power to sign and ratify treaties must trace its authority in each state to some legal font. If that font clearly ordains or prohibits something which the treaty-making power of that state is not free to alter, any treaty or convention which is entered into which is partially or wholly at variance with it must give way before the fundamental, permanent law, in so far as it is in conflict therewith.⁶²

It is not claimed that the Republic of Panama is not bound by the Monte-

3. There are said to be no other or unusual limitations or formalities in the treaty-making procedure. Department of State, *The Treaty-Making Power in Various Countries* (Washington, 1919), p. 55.

⁶⁰ Charles Cheney Hyde, *International Law* (Boston, 1922), Vol. II, pp. 9-10. Dr. Hyde notes the case of Cuba, which by constitutional declaration of June 12, 1901, and the treaty of May 22, 1903, with the United States, lost legal capacity to enter into a valid treaty with a foreign Power which would impair its independence.

⁶¹ Greco-Bulgarian Communities case. P. C. I. J. Publications, Series B, No. 17, p. 32. Judge Manley O. Hudson in his treatise on *The Permanent Court of International Justice* (New York, 1934), p. 544, says that up to 1934 the court had "not adverted to the question of whether international capacity of states is subject to their own constitutional limitations." No evidence can be found that the court has passed upon this question since then.

⁶² The Research in International Law at the Harvard Law School made an extensive examination of the literature and of the practice of states regarding this question in drafting Art. 21 of its Draft Convention on the Law of Treaties. It found that while some writers hold that a treaty made in excess of a constitutional limitation is internationally binding, a perhaps larger group of distinguished publicists hold that a treaty not in accord with the fundamental law of a state is not binding. It found that in practice states generally have denied the binding force of unconstitutional agreements, as has also been the case in jurisprudence. *This JOURNAL*, Supp., Vol. 29 (1935), pp. 999, 1002, 1005, 1008.

The United States, in particular, has held that treaties must conform to constitutional limitations. J. B. Moore, *Digest of International Law* (Washington, 1906), Vol. V, pp. 166-171; Hyde, *op. cit.*, Vol. II, p. 10; C. K. Burdick, *Law and Customs of the American Constitution* (New York, 1922), Sec. 34. For dicta of the United States Supreme Court, see *Cherokee Tobacco case*, 11 Wall. 620; *Downes v. Bidwell*, 182 U. S. 244, 370; *Missouri v. Holland*, 252 U. S. 416, 434; *Asakura v. Seattle*, 265 U. S. 332.

An examination of the Reports of the Supreme Court of Panama fails to reveal any ruling or dicta bearing upon the reconcilability of treaties and constitutions.

Panama has signed and ratified the Convention on Treaties adopted at Havana, Feb. 20, 1928, Art. 1 of which recites: "Treaties will be concluded by the competent authorities of the states or by their representatives, according to their respective internal law." M. O. Hudson, *International Legislation* (Washington, 1931), Vol. IV, p. 2378. From this article it may be deduced that treaties entered into by Panama shall be concluded on the basis of the Panama Constitution, of which Arts. 3 and 136, as well as 65 and 73, have been mentioned above.

video Convention on the Rights and Duties of States, or by the Buenos Aires Protocol of Non-Intervention, because of the existence of Articles 3 and 136 of her Constitution. It is submitted, however, that by entering into a general multilateral convention, a state which has a special contractual relationship with another state (whether established by treaty, by constitutional provision, or otherwise), does not necessarily affect or terminate that special arrangement, though the principles of the two acts be mutually contradictory, without the formal assent of the beneficiary Power.⁶³ It is generally admitted that specific provisions take precedence over general propositions, whether concluded before or after the instrument containing the general clauses. The agreement that there is no right of intervention (Montevideo), and the declaration that intervention is inadmissible (Buenos Aires), are generalized propositions, applicable in a broad way to the relations between all of the American Republics. They set forth a general principle, which may, however, be subject (either before or afterward) to special exceptions.⁶⁴ Weight is lent to this by virtue of Panama's having ratified the Convention on Treaties signed at Havana, February 20, 1928,⁶⁵ Article 18 of which reads:

Two or more States may agree that their relations are to be governed by rules other than those established in general conventions celebrated by them with other States.

⁶³ To be sure, Panama and the United States cannot adduce their special relationship as a basis for exceeding the terms of the Montevideo and Buenos Aires agreements with other contracting parties thereto.

The comment in the Draft Convention on the Law of Treaties of the Research in International Law of the Harvard Law School says: "a State cannot rely upon a provision in its constitution existing at the time a treaty was entered into to evade or justify non-performance of provisions in the treaty with which the constitutional provision is in conflict." This JOURNAL, Supp., Vol. 29 (1935), p. 1032. The Permanent Court of International Justice, in the Case Concerning the Treatment of Polish Nationals in the Danzig Territory, declared "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force." Publications, Ser. A/B, No. 44, p. 24. The cases and comments noted above refer to situations where a state contracts to do something or to allow another to do something when its Constitution forbids such action. The situation with respect to Panama is the reverse: where the state by treaty declares something to be inadmissible, which by its Constitution it decrees to be admissible.

⁶⁴ The comment upon Article 22(b) of the Harvard Research Draft Convention on the Law of Treaties advances the thesis that there may be "certain great multipartite treaties which by reason of their nature and purpose have something of the character of a constitution in its relation to a statute. . . . It is believed that certain parties to such instruments do not have the same freedom to alter them by particular agreements among themselves that they may have in respect to other multipartite treaties not having such a character." This JOURNAL, Supp., Vol. 29 (1935), p. 1018. In the absence of any agreement among the American Republics that the 1933 and 1936 instruments have such a precluding character, it must be presumed that they are subject to the normal exception which the comment recognizes.

⁶⁵ M. O. Hudson, International Legislation, Vol. IV (Washington, 1931), pp. 2378-2385.

This precept applies not only to future treaties but also to those in effect at the time of concluding this Convention.⁶⁶

✓ Specific treaties authorize the United States to construct, operate and maintain the Panama Canal. They entitle it to employ its armed forces for the protection of that Canal. The 1903 and 1936 treaties with Panama require the United States to go to the defense of Panama in case the security of that state is threatened. In return for this protection, the Republic of Panama by its Constitution recognizes a perpetual right of the United States in the Canal and Canal Zone, and also a right to intervene in the territory of the Republic in case public peace or constitutional order are disturbed. Revolution, civil strife, civil war or foreign intervention in the Republic of Panama might very well interfere with or jeopardize the construction, maintenance, operation or sanitation of the Panama Canal. Under the clauses of the 1903-1936 treaties with Panama, construed in the light of the articles of the Panama Constitution, the United States has a positive right (regardless of its own and Panama's adherence to the Montevideo and Buenos Aires agreements) to intervene, if necessary, in the Republic of Panama for the sake of protecting the Canal.⁶⁷

Article I of the General Treaty of Friendship and Cooperation between the United States and Panama, signed at Washington, March 2, 1936, states that "Article I of the Convention of November 18, 1903, is hereby superseded."⁶⁸ The 1903 article was objected to by Panama because it "established a virtual protectorate of the United States over Panama."⁶⁹ From the point of view of the United States, the 1903 treaty was lacking in certain respects. Panama was not made a partner in the Canal venture. She was not called upon to maintain a cooperative attitude toward Canal activities, nor was she required by treaty to aid or to take part in the protection and defense of the Canal. "Panama might, if it so desired, permit the conduct of activities not in the best interest of the operation and defense of the Canal and would not be violating any provision of the existing convention [1903]."⁷⁰ The good neighbor policy of the Roosevelt Administration disposed this Government to "eliminate, in so far as possible, all causes of friction and all grounds of legitimate complaint on the part of Panama, without sacrificing any rights deemed essential by this Government for the efficient operation,

⁶⁶ This same principle would seem to apply to a situation in which the agreement between the states took the form of permission written into the national Constitution.

⁶⁷ There is nothing in the Convention on the Duties and Rights of States in the Event of Civil Strife, signed at Havana, Feb. 20, 1928 (U. S. Treaty Series, No. 814), which would cause any complication.

⁶⁸ Supplement to this JOURNAL, p. 139. U. S. Treaty Series, No. 945. Ratifications were exchanged and the treaty was proclaimed July 27, 1939.

⁶⁹ Report of the subcommittee of the Committee on Foreign Relations of the United States Senate. Sen. Ex. Rep. No. 5, 76th Cong., 1st Sess., p. 4.

⁷⁰ *Ibid.*, p. 4.

maintenance, sanitation and protection of the Canal."⁷¹ What has the 1936 treaty substituted for the 1903 guarantee and its complementary constitutional authorization of intervention?

By Article I of the 1936 treaty, the parties agree that there shall be an "inviolable peace" between them, and "the two Governments declare their willingness to coöperate, so far as it is feasible for them to do so, for the purpose of insuring the full and perpetual enjoyment of the benefits of all kinds which the Canal should afford the two nations . . ." In Article II "both Governments . . . recognize, subject to the provisions of Articles I and X of this treaty, their joint obligation to insure the effective and continuous operation of the Canal and the preservation of its neutrality, and consequently, if, in the event of some now unforeseen contingency . . . the Governments of the United States of America and the Republic of Panama will agree upon such measures as it may be necessary to take in order to insure the maintenance, sanitation, efficient operation and effective protection of the Canal, in which the two countries are jointly and vitally interested." Finally, in Article X the parties covenant that:

In case of an international conflagration or the existence of any threat of aggression which would endanger the security of the Republic of Panama or the neutrality or security of the Panama Canal, the Governments of the United States of America and the Republic of Panama will take such measures of prevention and defense as they may consider necessary for the protection of their common interests. Any measures, in safeguarding such interests, which it shall appear essential to one Government to take, and which may affect the territory under the jurisdiction of the other Government, will be the subject of consultation between the two Governments.

These terms relieve Panama of the protectorate stigma and place the relationship between the two countries on a joint and two-way basis. At the same time, the United States obtains the right to take "such measures of prevention and defense" as may be necessary in the Isthmus or in Panama proper whenever the "security" of the Canal or of the Republic of Panama may be menaced by the threat of aggression or by the existence of an international conflagration. The wording of Article X clearly envisages the taking of military measures by the United States in the territory of Panama, and the United States' "Executive has stated that the word 'consultation' was deliberately used in order to avoid any implication that a prior agreement between the two Governments was a necessary step before immediate and expeditious action by our military and naval forces in an emergency could be taken."⁷² These propositions were formally accepted by the

⁷¹ Dept. of State Press Releases, March 2, 1936.

⁷² Sen. Report, *op. cit.* The report continues: "The Executive insisted upon this point during the course of the negotiations and has brought to the attention of the subcommittee extracts from the minutes which clearly reveal that the point of view of our Government was accepted by the Government of Panama." *Ibid.*, p. 5.

Government of Panama.⁷³ They have been regarded, together with Article XXIII of the 1903 treaty which was in no wise altered or superseded by the 1936 treaty, by the War and Navy Departments of the United States Government as making "adequate provision for the national defense."⁷⁴

The United States has acquired by virtue of the terms of the 1936 treaty a flexible, ample and sound legal right to take "such measures of prevention and defense" as it may consider necessary within the territory of Panama. It has also received an acknowledgment of the essential need of its armed forces holding military maneuvers and exercises in the territory adjacent to the Canal but outside of the Canal Zone.⁷⁵ If Article 136 of the Panama Constitution remains operative for the benefit of the United States, as indeed it should, considering the relationship established by treaty between Panama and the United States, so much the better. It has ceased, however, to be the main base upon which the United States need rely in case necessity should require the taking of measures of defense or prevention within the territory of Panama.

What of the compatibility of the terms of the 1936 treaty with Panama, and the provisions of the Montevideo and Buenos Aires agreements regarding non-intervention? Non-intervention remains the policy and commitment of the Governments of the United States and Panama. The 1936 treaty with Panama envisages coöperation, common concern and consultation in case military measures have to be taken within the jurisdiction of Panama by the United States. Under such circumstances, even though the "consultation" may necessarily have to follow rather than precede action, the "measures" taken by the United States would be lawful by international agreement between the United States and the Republic of Panama, and as such would lack the character of "intervention."

This completes the examination of the treaties and laws fundamental to American rights in the Isthmus of Panama, and which came into force prior to the commencement of the construction of the Panama Canal by the United States. With this legal framework in mind, it may now be pertinent to examine in detail the laws, executive orders, regulations, decisions, and agreements which have attended the operation and control of the Canal in peace and war.⁷⁶

⁷³ The acceptance of these views by Panama is evidenced by a note from the Panamanian Minister, Mr. Boyd, to the Secretary of State, Mr. Hull, dated Feb. 1, 1939, and "attached" to the treaty in its ratified and proclaimed form. The note is of vital significance. It is reprinted in this JOURNAL, Supp., p. 157.

⁷⁴ Sen. Report, *op. cit.*, p. 5.

⁷⁵ Note of the Panamanian Minister to the Secretary of State, *loc. cit.*

⁷⁶ These will be dealt with in a succeeding issue of the JOURNAL.

THE ENEMY ALIEN PROBLEM IN THE PRESENT WAR

BY ROBERT M. W. KEMPNER

Institute of Local and State Government, University of Pennsylvania

At the beginning of this war, September 3, 1939, the usual legal concept of the term "enemy alien," as it was known in the war of 1914-1918, appeared again in Great Britain, France, and Germany. (Great Britain, in the Enemy Act of 1939, defines an enemy subject as "an individual who not being either a British subject or a British protected person, possesses the nationality of a state at war with His Majesty the King";) France defines the term as "*les ressortissants ennemis*";¹ the Reich, as aliens belonging to an enemy state, and includes those persons without nationality who before the loss of their nationality were citizens of an enemy Power.²)

In spite of the similarity in legal form, there is one essential change in its application as compared to previous wars: a totally different circle of persons seen from a political and sociological viewpoint is affected. This article attempts to state and offer explanations of the newly created laws for enemy aliens and their actual situation based on material from official sources, reports from neutral observers, eye-witnesses, and inmates of internment camps.

To begin with, the actual outbreak of war in September, 1939, was preceded by the White War which started in March, 1935, after the resumption of conscription by the German Reich.⁴ From this time on, the police of the countries now at war undertook the constant, but frequently unsuccessful, watching and control of citizens of prospective enemy states living in their country. These measures, plus the advice of the various consulates,⁵ produced a homeward migration of prospective enemy aliens even before the war officially began in September, 1939. The number of enemy aliens continued to decrease, because Great Britain, France, and Germany, contrary to their 1914 policy and because of a desire to alleviate as much as possible problems such as added expenditure, food, and the need for special guards to protect the enemy aliens, facilitated their departure by administrative measures. After the outbreak of the war, in addition, an exchange of women and children who had not been able to return to their homes in time, was brought about by the mediation of neutral governments. Those who departed were generally friends of their own respective governments and were

¹ London Times, Sept. 5, 1939. The Aliens Order, 1920, has been amended by an Order in Council, Sept. 1, 1939; see also Trading With the Enemy Act, 1939.

² *Journal Officiel*, Paris, 1939, p. 11238.

³ *Reichsgesetzblatt*, Berlin, I, p. 1667 (1939).

⁴ *Ibid.*, I, p. 369 (1935).

⁵ *Ibid.*, I, p. 187 (1937); I, p. 113 (1938).

not the refugees from Nazi oppression. There are about 74,000 Germans and Austrians left in Great Britain and more than 45,000 in France.⁶ There were about 100,000 left in 1914, but they were real enemies.⁷

Most of the present 120,000 persons feel no loyalty to the National Socialist Government, a government which has driven them into exile for political, racial, or religious reasons (refugees). Therefore, although they are "enemies" by origin, speech, and culture, they are often admirers of the enemy state in which they live. Characteristic of this, the *Pariser Tageszeitung*, a former influential paper of the refugees in France said: "The German refugees are on the side of France and her Allies. . . . We do not know any other goal than the defense and the military victory of those states that are the enemies of National Socialist Germany."⁸ The Committee of Austrians in England, representing Austrians who do not recognize the annexation of their country, says: "In this hour we are filled with a deep gratitude towards Britain, who refused formally to recognize the annexation of Austria. . . . God be with Britain!"⁹

These statements illustrate best the newness of this problem which appeared only in a small way during the last war. At that time it concerned natives of Alsace-Lorraine, Poles, Czechs; and Greek, Armenian, and Syrian subjects of the Ottoman Empire.¹⁰ The number of those unwilling subjects of their country was by no means as large as the number of technical enemy aliens is today.

The citizens of the former Czechoslovakian Republic form a special group. Great Britain and France do not regard them as enemy aliens.¹¹ In Greater Germany, on the other hand, the citizens of the Bohemian and Moravian Protectorate are also not considered enemy aliens.¹²

GREAT BRITAIN

The British Government took stock of the new situation as early as the fourth of September, when Sir John Anderson, British Home Secretary spoke in the House of Commons. He made a sharp distinction between real enemy aliens and technical enemy aliens. New measures instituted by an Order in Council were brought to bear very quickly. First, in a very few weeks, more than 74,000 enemy aliens, mostly refugees were ordered to register. Next the investigation was carried out by the political branches of Scotland Yard and by detectives from the Criminal Investigation Department in collaboration with the refugee committees.

⁶ Unpublished official reports.

⁷ *Journal des Débats*, Dec. 12, 1915; House of Commons, Dec. 14, 1915.

⁸ *Pariser Tageszeitung*, Aug. 31, 1939.

⁹ *Das Neue Tagebuch*, Paris, Sept. 30, 1939.

¹⁰ *Journal des Débats*, Dec. 12, 1915.

¹¹ The London Times, Sept. 5, 1939.

¹² *Reichsgesetzblatt*, I, p. 1668 (1939).

For the final decision, 112 aliens tribunals were instituted all over the country, but mostly in and around London, presided over by a King's Counselor who sits with a clerk and a liaison officer appointed by the Refugee Committee. The proceedings are private, with a detective inspector acting as secretary. Usually there is also an interpreter present. Each enemy alien appearing at court may bring an English friend but not a legal representative with him who will vouch for his sentiments and good faith towards Great Britain.

The presiding judge must determine whether the enemy alien is a real enemy of the Allies or a "friendly enemy." If the alien in question is found to be a real enemy, a Nazi, or a Communist, he is interned and classed as Class A. If there is some doubt, he is registered as an enemy alien and put under restrictions which usually mean prohibition to move more than five miles from his residence and to possess cameras or driver's permits, and periodic reports to the police. He is classed in Class B. The first known case of violation of restrictions concerned a twenty-eight-year-old German refugee woman who was accused on October 13, 1939, of changing her residence without permission. The penalty was twenty-one days' imprisonment with hard labor.¹³ Another case, which created great excitement and was discussed in the House of Commons, was that of Solf, a student, son of the former German Ambassador to Japan. Solf, without the right to possess a camera, photographed a German airplane which had crashed in England, and for that was punished by one month's imprisonment.

The friendly aliens who are technically enemies are the Germans and Austrians who can convince the tribunals of their true friendship for the Allies. Many could prove they had lost their German citizenship for political reasons¹⁴ or that they had spent time in German concentration camps or Italian prisons during the Hitler visit in Italy in 1938. These people are free from all restrictions, the term "Refugee from Nazi Oppression" rather than "Enemy Alien" is placed on their registration cards, and they are classed as Class C.

It was generally considered that the decisions of the judges were fair and just. The few complaints that were made were discussed openly and fully.¹⁵ There is also possibility for appeal to an Advisory Committee, the members of which are very competent individuals and are presided over by an eminent lawyer.

All types of people from all walks of life were investigated. There were former government officials, former parliament members, Nobel prize winners, scientists, scholars, artists, authors, industrialists, and businessmen, all with their wives and children. There were such notables as Herman

¹³ The London Times, Oct. 14, 1939.

¹⁴ *Reichsgesetzblatt*, I, p. 480 (1933).

¹⁵ Letters from Anne Freemantle, liaison officer, The London Times, Oct. 28, Nov. 7, 1939; also Parliamentary Debates, House of Lords, Vol. 114, No. 128, Oct. 31, 1939.

Rauschning, famous author of *Revolution of Nihilism*; Rudolf Olden, author of a biography of Hitler; former republican Vice President of Police Dr. Weiss, against whom Dr. Goebbels once directed a part of his propaganda; Captain Franz Rintelen von Kleist, head of German spies in the United States in the last war and author of *Dark Invader*, who has been living in London for a few years. Dr. E. Hanfstaengl, Hitler's erstwhile friend, is detained in Great Britain.¹⁶ After short internment the German survivors of the *Athenia* appeared before the tribunals and were allowed to continue their journey to the United States. Of the total members approximately 20,000 are household servants, mostly maids. More than 42,000 Germans are living in the metropolitan police area of London.¹⁷

The aliens courts have worked so efficiently as to have examined 74,233 cases in six months—62,244 Germans and 11,989 Austrians. Of these, nearly 64,000 were exempted from internment and from special restrictions, and 2,000 were interned.¹⁸ There were then only 2.5% of the total in internment camps (Class A), 10.8% with special restrictions (Class B), and 86.7% without restrictions (Class C). How different from the situation in February, 1915, when of the total 50,000 enemy aliens, 99% were interned and only 1% or 430 persons were not!

This distinction is of great importance, both in general and in particular, as for example in the question of obtaining work. Members of Class C can register with the Ministry of Labor, Local Labor Exchange, and state their qualifications; those of Class B must have a special permit from the Aliens Department of the Home Office.¹⁹ A part of those in group B has been subjected to a further systematic review in the spring of this year by twelve regional advisory committees, the chairmen of which are King's Counselors. This examination was connected with discussions in the English press in regard to the value of references which English persons have given for foreign servants in their households.²⁰

The question of using the aliens for auxiliary war or military service depends on the facts of the case in question. Refugees who have acquired British citizenship would ordinarily be subject to some form of military service abroad, but will not be put in fighting units to go against German forces.²¹ Many thousands of other refugees have joined up for special duties in a "Pioneer Corps," which is located behind the lines on the Western Front. This corps, commanded by British officers, is certainly the most intellectual army ever to have existed. A report of the British Broadcasting Corporation has stated: "All are doing hard work without complaint. But the

¹⁶ The New York Times, Dec. 7, 1939.

¹⁷ Annual Report for 1939 of the Metropolitan Police, London.

¹⁸ The New York Times, Jan. 21, March 23, 1940.

¹⁹ Report by the Bloomsbury House, London, Nov., 1939.

²⁰ The London Times, Feb. 23, 1940.

²¹ The New York Times, March 5, 1940.

result is efficiency and coöperation."²² The volunteers receive two shillings a day like the English soldiers; the women 17 shillings a week as dole.

The possibility of naturalization of a person technically an enemy alien depends on whether the alien has been declared friendly or not.²³ Many enemy aliens became British citizens after the outbreak of the war, e.g., Richard Tauber, well-known Austrian tenor, and Stefan Zweig, the famous Austrian author of *Marie Antoinette* and *Joseph Fouché*.

The British Home Secretary appointed, in March, 1940, Sir Ronald Marcleay, former British Ambassador in Prague, to examine the cases of 9,000 citizens of the former Czechoslovakian Republic. These examinations which are not open to the public were necessary, because a great number of girls from the Sudeten areas were suspected of being Nazi sympathizers. The German-born wives of British subjects, married a few days before the start of war, form a special group. The number of such persons and of persons of dual nationality is 35. They were detained and a Special Advisory Committee examined the cases.²⁴

Finally the problem arises in this war, as in the last war, concerning persons who are not technically enemy aliens, but who are actually enemies in sentiment. Regulation 18 b of the Defense General Regulation, 1939, empowers the Home Secretary to order the internment of any person if there is reasonable cause to believe that person to be of hostile origin or associations or to have been recently involved in acts prejudicial to the public safety or to the defense of the realm, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him.²⁵

Reports concerning the treatment of civilians interned in British camps are all favorable, mentioning items such as open air, newspapers, and other facilities. One such report published in the *Excelsior*²⁶ speaks of a so-called U-Boat Hotel in northern England composed of well-built homes with running water and steam heat, and housing both prisoners of war and civilians. Some of the prisoners, including crews of captured German U-Boats or of scuttled freighters, are Nazis, so that the camp was politically divided with apparently no ill-results other than a slight controversy over the election of a camp representative. A similar discussion took place in the House of Commons about the leadership of the internment camp at Swanwick, Derby. A refugee from Vienna remarked: "In some ways this is worse than Dachau. There one has Nazi guards but one is among one's own people. Here we have honest English soldiers as guards but we are forced to live in close proximity to people who persecuted our relations and whose

²² *Der Aufbau*, New York, May 24, 1940.

²³ London Gazette, Oct. 13, 1939; The London Times, Oct. 17, 1939; Contemporary Jewish Record, New York, Vol. 3, No. 3, 1940.

²⁴ Statement by Sir John Anderson in the House of Commons, Oct. 31, 1939.

²⁵ The London Times, May 3, 1940.

²⁶ *Excelsior*, Paris, Oct. 4, 1939.

principles we have fought all our lives."²⁷ The inmates are allowed to write two letters a week which are censored. There are some camps of importance, one at Seaton in Devonshire, another in Edinburgh. Further, the Isle of Man and the Isle of Wight were chosen for internment districts.

BRITISH EMPIRE

Just as in Great Britain itself, there is also a sharp distinction made in the Empire between those enemy aliens who are only technically enemies and those who are enemy aliens in sentiment. On September 7, 1939, the Prime Minister of Australia expressed the hope that Australians would not deny friendly aliens who had sought asylum in Australia the right to employment and the ordinary privileges of social life. He also stated that aliens unfriendly to Australia's cause were to be interned or subjected to other restrictions. In Palestine also, the authorities distinguished between friendly and unfriendly aliens. 1,300 male sympathizers with the Third Reich, subject to military duty, are interned. 200 are in an internment camp near Acre, and 1,100 remain in their old German settlements between Tiberias and Haifa. The settlements have been fenced in with barbed wire. Internees are let out for daily work in the fields.²⁸

In the former colony of German East Africa, now Tanganyika Territory, the Germans subject to military duty are interned in a camp near Daressalam. In the colony once known as German Southwest Africa, about 100 men are interned in the former German wireless station near the Windhuk Observatory.²⁹ In January, 1940, six hundred persons not subject to military duty, two hundred of which were children, were permitted to return to Germany from Kenya and Tanganyika and were ceremoniously received in Berchtesgaden.³⁰

According to the *Deutsche Allgemeine Zeitung*³⁰ there are interned in the British camp Ahmednagar, 100 miles away from Bombay, five German members of the Himalaya Expedition subject to military duty. Others are interned in Hongkong, but most Germans in the Far East have left British territories for the Dutch East Indies (where they were interned in May, 1940), for Portuguese Macao, or for Shanghai.

The Canadian Government also is interested in the attitude of the alien. Nearly 10,000 German citizens are allowed to carry on their normal occupations provided they report regularly to the police and do not attempt to leave the country. Fewer than 500 male enemy aliens are now interned in Canada as compared with 8,000 in the last war. As in Great Britain, there is a possibility of appeal against confinement. There are two camps

²⁷ The New York Times, April 7, 1940.

²⁸ Special report by Cornelius Schwarz, Refugee Headquarters of the NSDAP, Berlin, Nov., 1939.

²⁹ *Frankfurter Zeitung*, Dec. 6, 1939; *Berliner Illustrierte Zeitung*, Berlin, No. 9, 1940.

³⁰ *Deutsche Allgemeine Zeitung*, Nov. 24, 1939.

toilet articles. They were interned in these "centres" without distinction as to whether they were friendly or enemy aliens.³³ Approximately 15,000 Germans and Austrians, mostly refugees, were interned in about sixty camps, according to a declaration in the Chamber of Deputies on December 8, 1939. These "centres" were hastily improvised during the first days of the war from race tracks and stadiums. Accommodations and lodgings were consequently primitive and very insufficient. They were located at Colombes, near Paris, Maison Lafitte, Meslay, Nevers, Lyons, etc.³⁴ One of the largest camps in the south was that in the Stade au Fort Carré near Antibes on the Riviera. Many well-off refugees were encamped here. Some had French wives and had lived for years in France. Others declared themselves ready to fight for France.³⁵

The lack of foresight on the part of the French Government and the sternness of their measures can be seen from the statement made by a famous ex-German politician who had lived in France as a friend of France for many years, but because of his German origin, had to go to a camp. He said, "It was the same with hundreds and thousands of others. . . . No means to wash oneself; no canteen was ready, and I am no longer a youngster to lie on straw and hard stone floors. . . . Assuredly many have fared worse in life . . . but I want to impress something on you: it seems incomprehensible that these measures, although fully justified as compared to Nazi pranks, were used indiscriminately even in the cases of declared friends of France such as myself."³⁶

The French public has only gradually come to the realization that a sharp distinction in the treatment of enemy aliens should be made in France also, and that they should distinguish between real enemies and those who are only technically enemies.³⁷ The climax of the public discussion was reached in a famous debate on the status of refugees in the Chamber of Deputies on December 8, 1939. The Deputy Marius Moutet, a former member of the Cabinet, famous as the defender of Caillaux, supported by the Deputy Grumbach, pointed to the example of Great Britain in a persuasive speech. He stressed that it was unreasonable to intern the enemies of one's own enemy and that internment should only take place when national safety really demanded it. The French Minister of the Interior, Albert Sarraut,

³³ Unpublished Circular of the Ministry for the Interior, Paris, Sept. 4, 1939.

³⁴ *L'Intransigeant*, Paris, Sept. 7, 1939; *Pariser Tageszeitung*, Sept. 16, 1939; *Le Petit Niçois*, Nice, Sept. 18, 1939; International Relief Assoc., N. Y., Vol. VI, No. 8, and appendix, Jan., 1940; *Bulletin Officiel du Ministère de l'Information*, April 15, 1940.

³⁵ *Le Petit Niçois*, Sept. 6, 1939.

³⁶ Special Report (censored), Nov. 1, 1939; see also E. E. Noth, *L'Allemagne exilée en France* (Paris, 1940).

³⁷ Wladimir d'Ormesson: *Figaro*, Paris, Dec. 21, 1939; Marius Moutet: *La Lumière*, Paris, Nov. and Dec., 1939; *Le Petit Parisien*, Paris, and *Justice*, Paris, Nov., 1939; *The Nation*, Dec. 16, 1939; *Der Aufbau*, New York, Jan. 4 and 12, 1940; *The New York Times*, Dec. 3, 10, 17, 1939.

declared in this debate, and again in the Senate on December 26, 1939, that it had been impossible at the beginning of the war to separate the dangerous aliens from the others. For many weeks, the military commissions (*commissions de criblage*) had been working in the camps. He admitted the commissioners had not always understood the instructions given them. He himself, along with the War Ministry, would now see to it that the investigation commissions should work better and more rapidly. Of the 15,000 interned Germans and Austrians, he reported that 7,000 had been released in the first three months of the war.³⁸

In the administrative procedure under the aegis of the Ministry of War and of the Ministry of the Interior the following factors played a decisive rôle:

Persons who are suspected of being sympathizers of Hitler or Stalin have not been released. Favorable conditions for release were: references from influential French citizens; favorable reports from the police records, which unfortunately are not in good order; furthermore, the fact that near relatives, as for example wife or children, are French by birth; refugees from Austria and from the Saar Basin likewise were given preferential treatment. Others released were Germans whose citizenship had been canceled by the Third Reich, and some famous authors, such as Hitler's biographer, Konrad Heiden; Dr. Carl Misch, editor of the *Pariser Tageszeitung*; Lion Feuchtwanger, author of *Josephus* and *Power*. Likewise men who did not seem fit for military duty, and such refugees as were able to leave France for overseas, were released.

Ex-Germans and ex-Austrians and enemy aliens who have claimed the right of asylum in France are required to join the Foreign Legion in accordance with French laws, that is, when they are between 20 and 48 and fit for military duty. Those younger than 20 or older than 48 can be recruited for other services in the interest of France, for the so-called *formations de prestataires*. Many thousands have volunteered. The first transport of 600 technical enemy aliens left France on December 29, 1939, together with French soldiers for Sidi-bel Abes, headquarters of the Foreign Legion. More transports followed.³⁹ I have at hand interesting reports of the military service in North Africa of these Foreign Legionaries, among whom are well-known Berlin journalists and physicians. The French Government does not wish, for various reasons, to use them at the Western Front. Prince Ruediger von Starhemberg has been appointed lieutenant in the regular French Army.

Meanwhile, the interned aliens have been removed to permanent camps in the west of France. Here a part of these men have daily work in the French war industries or on farms for a salary of six francs and twenty

³⁸ *Journal Officiel, Débats Parlementaires*, No. 64, Dec. 8, 1939.

³⁹ *Décret-Loi*, Apr. 12, May 27, July 20, 1939, Jan. 13, 1940, *Journal Officiel*, 1939, p. 11129, and Jan. 18, 1940; cf. also *Journal Officiel*, Nov. 2, 1939; *Paris Soir*, Dec. 29, 1939; *Der Aufbau*, Feb. 2, May 24, 1940.

cigarettes a day. According to the *New York Times* and the *Friends Intelligencer*,⁴⁰ the camps are fairly hygienic and the food is fair and served in French army rations. Special concentration camps, e.g., in Vernet, have been provided for the "*Indésirables*," i.e., especially for Communist sympathizers, including special camps for women.⁴¹ In these camps which are subject to special regulations, there are not only enemy aliens, but also so-called Italian Stalinists and many French Communists.

The question of the naturalization of technical enemy aliens who are performing military or other services for France, can be settled at the discretion of the French Ministry of Justice. Thus, for example, the Viennese composer Oscar Straus was naturalized. In two points the procedure of naturalization of enemy aliens has been changed. Every son born on French soil, although of foreign parents residing in France, automatically becomes a French citizen at the age of 18. Female enemy aliens may no longer acquire French citizenship through marriage to a Frenchman.⁴²

GREATER GERMANY

The number of persons of British and French nationality now present in Greater Germany is very small. There were four to five thousand of them, but most of them left during the first days of the war. The hundreds who remained are, for the most part, either closely related to German citizens or are political supporters and sympathizers: friends of National Socialism from the British or French Colonial Empire or Alsatian autonomists of French nationality. This total number is very small considering that there were about 4,000 British subjects alone in Germany during the war of 1914-1918.⁴³ In contrast, the number of Poles present in the Altreich which has always been large (1933: 148,787), is much larger than that of the Western Allies.

Germany's first step at the opening of the war was to require immediate registration of all enemy aliens with the local police station (*Ortspolizeibehörde*). The British were registered first, and then the French. Registration was also required of those of enemy nationality who also possess German citizenship. The German Commissar (*Oberlandrat*) rather than the local Czech police is in charge of the registration of enemy aliens in the Bohemian and Moravian Protectorate. Next, enemy aliens are forbidden to leave their places of residence and require special permits to change their residence or to go abroad. The police are further authorized to demand regular reporting to the police station or to impose detention, but it is the higher

⁴⁰ *Friends Intelligencer*, Jan. 27, 1940; *The New York Times*, Dec. 17, 1939.

⁴¹ *Décret-Loi* published in the *Journal Officiel*, Nov. 19, 1939; *Le Petit Niçois*, Dec. 2, 1939; *Neue Volkszeitung*, New York, Dec. 9, 1939.

⁴² *Décret-Loi*, Oct. 19, 1939, *Journal Officiel*, Dec. 9, 1939, p. 11399 *et seq.*

⁴³ There were British and French subjects in Germany according to *Statistisches Jahrbuch*, and annotation in Kempner, *Security Police*: 1910: 39,724; 1933: 14,241.

police authorities (*Kreispolizeibehorde*) who are authorized to order internment. There is no possibility of appeal against any of these measures.

Only a few hundred British and French subjects of military age were detained in camps, but not the supporters of the Third Reich. Many thousands of Poles, however, particularly those of Jewish extraction, were sent to concentration camps such as Buchenwald, Dachau, Sachsenhausen, and there they suffer treatment as cruel as that the German inmates receive.⁴⁴

Naturalization is possible for enemy aliens. Foreigners, even as young as eighteen, who volunteer for the army, need no longer have the permission of their legal representative to obtain citizenship.⁴⁵

APPREHENSION OF NEUTRAL VESSELS

The status of enemy aliens on the high seas has been often discussed. See the detailed treatment of this matter by Herbert W. Briggs. The writer of the present article believes, on the basis of the Declaration of London, February 26, 1909, that belligerents have a legal right to remove enemy aliens from neutral ships in so far as actual or potential members of the armed forces of the enemy are concerned.⁴⁶

In this war we have two distinct groups: first, the Germans of military age who travel from overseas to Germany to fulfill their military duty. A number of these were removed from neutral ships by British and French naval authorities and interned: e.g., 34 men from the Dutch steamer *Nieuw Amsterdam* in September, 1939; 25 men from the Portuguese liner *Carvalho* on December 8, 1939; 6 men from the Portuguese liner *Nyassa* on February 6, 1940; and 21 from the Japanese liner *Asuma Maru* on January 21, 1940. A dispute arose between British and Japanese authorities whether international law permits only the seizure of actual members of the armed force or also of potential members.⁴⁷ The dispute was settled by the release of nine captives and by a statement. A French warship took ten midgets of German nationality from the Italian liner *Saturnia* on December 4, 1939. They are now interned in a concentration camp near Aix in Provence. The French officer in charge of the camp said: "Those little fellows would make ideal spies because of their small size. They could hide almost in a desk drawer without anyone suspecting they were there."⁴⁸ (!)

The second group includes those refugees traveling with German passports from Europe overseas. It is hard to understand why French authorities arrested such westbound passengers. Their refugee status, often

⁴⁴ Special report by eye-witnesses.

⁴⁵ *Reichsgesetzblatt*, I, p. 1741 (1939); *Reichsministerialblatt f.d. Innere Verwaltung*, p. 2005 (1939).

⁴⁶ Herbert W. Briggs, "Removal of Enemy Persons from Neutral Vessels on the High Seas," *this JOURNAL*, Vol. 34 (1940), p. 249.

⁴⁷ The New York Times, Feb. 6, 1940; see also *Reichsgesetzblatt*, I, p. 1585 (1939).

⁴⁸ *Popolo d'Italia*, Dec. 12, 1939.

recognized by certificates issued by consulates or refugee committees, should prove they were not "embodied in the armed forces of the enemy."⁴⁹ 58 male passengers were taken from the Italian liner *Conte di Savoia* and then released from French internment camps only after long negotiations by refugee organizations.⁵⁰ Furthermore, eight male passengers were taken from the Italian liner *Saturnia* by a French submarine. They had to spend eleven days on the submarine before they were landed at Casablanca and there released with permission to proceed to the United States.⁵¹

ENEMY ALIENS AS RADIO SPEAKERS

Highly qualified enemy aliens in England, refugees from Germany and Austria have become a particularly powerful propaganda menace by speaking against their native land over stations of the British Broadcasting Corporation. Graf Huyn, one of the first speakers, is an Austrian-born admirer of German culture and philosophy. He is the son of a general, himself a naval officer until 1918, and was employed in the Austrian Embassy in London during the rule of Bundeskanzler Schuschnigg. At the annexation of Austria, he was recalled to Vienna by his superiors, and failing to answer the summons, he was dismissed from service.

In the same way, technically enemy aliens are participating in the German broadcasts from French radio stations. The Austrian group has a special organization for broadcasts on the so-called "Austrian Hour from Paris." On November 2, 1939, I heard a poem read on this program: "When your day of victory breaks, Oh Beauteous France, Then the sun will shine again, Over our Austria."

On the other side French and British subjects are working in the German *Rundfunk*. The most famous is "Lord Haw Haw of Zeesen" whose propaganda broadcasts from Germany have made him a national figure in Great Britain. He is identified as William Joyce, a London University graduate, former propaganda chief for the British Union of Fascists. He was connected for a long time with the German Propaganda Ministry and left England for Germany a few days before the start of the war. William Joyce's two brothers were interned in England in June, 1940.

Paul Ferdonnet, a former French government official who was discharged for misconduct, specialized in appeals in German for German-French friendship against Great Britain, the common enemy. It was in 1935 that Ferdonnet entered the service of Germany. His mission was to develop among French nationalistic circles an Hitlerian undercurrent. At the behest of the German propaganda he wrote and circulated in France in 1938 various pro-Hitler pamphlets. The former French Prime Minister Daladier has mentioned him as the "Traitor of Stuttgart." André Obrecht is the other "Traitor of Stuttgart." Obrecht, alias Saint-Germain, left France hurriedly

⁴⁹ Declaration of London, Art. 47.

⁵⁰ The New York Times, Nov. 15, 1939.

⁵¹ *Neue Volkszeitung*, Feb. 3, 1940.

a few years ago, appeared in bit parts in German films, then was drafted into the German radio service, where he hammers away with his slogan, "The British will provide the machines, the French will provide the breaths." Recently the French Republic gave its answer to both Ferdonnet and Obrecht, by court-martial. After considerable ceremony both were sentenced to death for treason, and then, anti-climactically, their property was confiscated.

Sidney Erick Holm, a citizen of South Africa, speaks to the Afrikaans from Germany in Afrikaans. He is a former Natal school teacher who lived in Germany for some years, returned to Africa in 1934 at the expense of the South African Government, and then returned to Germany. Since he is the son of a Rabbi, and since there is a German law forbidding any Jewish participation in radio broadcasts, his position is unique. El Bahi, a citizen of the French Colonial Empire, speaks over the German radio in Arabic for \$500 a month. He was born in Iraq and went to the "*École Normale*" in Bagdad. Forced to leave because of bad conduct, he went to India. Banished from there, he fled to Paris where he was employed in a "*maison de tolérance*," and then on to Java where he founded an anti-Mohammedan journal. It was in the Orient that he became connected with the German Intelligence service. Sought there by the police, he succeeded in flying to Germany where he works with a countryman of his, Chekib Arslan.

ENEMY ALIENS AND "FIFTH COLUMN"

The preparation and the carrying out of the German occupation of Denmark, Norway, Holland and Belgium in April and May, 1940, drew the attention of the Allies to the question of the treatment of enemy aliens. It is certain that the German troops received help from within the now occupied countries. In the Allied press one wondered whether the immediate internment of all enemy aliens might not be necessary in order to prevent "fifth column" activity. From certain quarters there rang out the cry, known from the first World War: "Put every Hun behind barbed wire and we shall win the war."⁵²

In contrast to this, figures like Sir Norman Angel, Josiah C. Wedgwood, A. Cazalet, maintained that it would be to the interest of the Allies to lay down a sharp line of demarcation between opponents and sympathizers of the Nazi régime, regardless of former citizenship.⁵³ This is now the view of the British Government, which was expressed in an editorial of the *London Times*: "Our alien problem calls for ceaseless vigilance but not for wholesale internment. . . . Moreover the aliens in this country are not the only, nor even the most probable material for fifth columns. The Quislings in other countries have not been Germans."⁵⁴

⁵² The New York Times, Apr. 7, 1940.

⁵³ *Der Aufbau*, May 24, 1940; The London Times, May 20, 1940.

⁵⁴ The London Times, Apr. 23, 1940.

As a matter of fact, military and police investigations have clearly shown that activity in a "fifth column" is a question of political belief and not one of citizenship or passport. The manifold help of the members of the Norwegian, Danish, Dutch, and Belgian Nazi organizations, which helped the occupation along with "*getarnten*" German agents, prove this clearly. Leading officials of the political police in various European countries acknowledge openly what serious mistakes have been made since 1933 in this respect: thus the regulations for a visa for refugees were much more strict than for members of the *N.S.D.A.P.* who had a permanent residence in Germany. While refugees were subject to severe registration and residence regulations, there was no proper supervision for the so-called tourists. Moreover, it has been shown in Europe that the usual residence registration of natives as well as of aliens is only of limited value. The relentless fight against individual agents and organizations which are carrying on "fifth column" activities and propaganda in foreign interests, has proved itself much more important.

The Allies have drawn from this experience the following conclusions: in Great Britain and in France in May, 1940, on the basis of emergency power, several thousand persons, suspected of being enemies in sentiment, were interned by administrative measures, without regard for their nationality. Among others were Sir Oswald Mosley, British Fascist leader, and eight of his lieutenants.⁵⁵ At the same time the authorities of the Allies arranged that the tens of thousands of refugees from the Low Countries should be subject to the same registration and investigation as the technical enemy aliens. Moreover, in Great Britain definite restrictions were placed on all aliens, even on citizens of the United States: for example, they must remain indoors at night and they may not have bicycles in their possession.⁵⁶ In addition, the enemy aliens of category B in Great Britain, who previously were subject to lighter restrictions, were temporarily interned on the Isle of Man. The women of category B were not exempt from this internment. Those with children less than 16 years old were permitted to take them along. At the end of May, 1940, of the 74,000 technical enemy aliens, there were interned about 9,000 *in toto*, of which 1,500 were women.⁵⁷ Urged to intern the other 65,000, Sir John Anderson, in reply to a question in the House of Commons, said present plans regarding enemy aliens were not final. While he was speaking, it was disclosed in another part of London that Germans were serving as air-raid wardens and marshals of air-raid shelters in Hampstead.⁵⁸

As a result of the increasing gravity of the military situation in the vicinity of Paris, the military Governor of Paris, General Hering, ordered the intern-

⁵⁵ The New York Times, May 24, 1940.

⁵⁶ *Ibid.*, May 17, 26, 30, 1940; The London Times, May 24, 1940.

⁵⁷ The New York Herald Tribune, May 28, June 7, 1940.

⁵⁸ The New York Times, May 31, 1940.

ment of all technical enemy aliens between 17 and 55 who were in the threatened area. The men were assigned to the Stade Buffalo, the women to the Vélodrome d'Hiver.⁵⁹ The same also took place in other districts. Several of the interned women are married to American citizens.

ITALY'S ENTRANCE INTO THE WAR

By Italy's entrance into the war on June 11, 1940, the problem of the enemy aliens has been further extended. The number of British and French subjects, who still resided in Italy on June 11, is very small. The number had already been greatly reduced during the Ethiopian War. Men subject to military duty were interned.⁶⁰

In the British and French Empires mainly in the Mediterranean areas, however, live one to two million Italian subjects: in France, 900,000 (1936); in Algeria, 28,000; in Morocco, 10,000; in Tunis, 94,000 (1936), about one-half of the total white population; in Egypt, 76,000. In Great Britain reside about 12,000 Italian citizens; in Canada, 16,000; in Australia, 17,000.⁶¹

These enemy aliens belong to different groups: politically neutral émigrés, anti-Fascist refugees—Catholic, liberal, socialist, communist groups; men like Francesco Nitti, a former Italian Prime Minister; Count Carlo Sforza, a former Foreign Minister; the historian Guglielmo Ferrero and others. But there is also a large number of Fascists working on French and British soil.⁶²

According to the French and British regulations, the Italians have been registered with the police since September, 1939. After Italy's entrance into the war the militant Fascists were interned. At the same time the French Minister of the Interior, Georges Mandel, ordered all Italians to choose between subscribing their loyalty to France and their willingness to submit to French military authorities or internment. This order is based on the *Décret-Loi* concerning the right of asylum in France.⁶³ This procedure indicates that also with regard to the Italians a sharp distinction is being made between real enemy aliens and friendly residents of Italian citizenship. According to radio reports 75 per cent of these Italians have declared their loyalty to the Allies.⁶⁴

CONCLUSIONS

The present situation proves that a distinction must be made between the following groups:

First, the small group of real enemy aliens: the men of this group are now interned in all belligerent countries. As far as Germans are concerned, all

⁵⁹ *Le Matin*, Paris, May 14, 1940; *Le Journal*, Paris, May 15, 16, 1940.

⁶⁰ *Radio Roma*, June 13, 1940.

⁶¹ *The Annals*, May, 1939; *Egitto Moderno* (Edizione Roma, 1939).

⁶² Sir John Hope Simpson, *The Refugee Problem* (London, 1939).

⁶³ See note 39, *supra*.

⁶⁴ *Radio Paris Mondial*, June 13, 1940.

are members of the *N.S.D.A.P.* or of the German Labor Front. The International Committee of the Red Cross in Geneva gives information concerning their whereabouts and has charge of the exchange of letters between them and their relatives.

The second much larger group consists of the German, Austrian, and Italian refugees and émigrés who are technical enemy aliens. Their status has been investigated in Great Britain by the newly created alien tribunals. Those who sympathize with the cause of the Allies in the opinion of the tribunals are treated as friendly aliens. The British Government also gives them relief. In France the recognition of the status of the German refugees is as yet not so clear nor so practical as in Great Britain. With regard to the Italians a clear distinction has been made in both countries between loyal and disloyal individuals.

The third and largest group are the enemies in sentiment, that is the nationals who wish the victory of the enemy. In Germany many thousands of this group have been in concentration camps for years. France and Great Britain, because of their liberal attitude, have interned enemies in sentiment, that is, sympathizers of National Socialism, Fascism, and Communism, only in the course of the war. The enemies in sentiment, actual or potential members of the "fifth column," can be detected not by registration measures, but only by general political and special police measures, which must be different in the various countries.

In this war, as we see, it is more important to inquire into the fundamental spiritual loyalties of a person rather than the formal facts concerning his national origin and previous residence. Whether there will be a fundamental change in the attitude towards this whole problem will finally depend on the future military developments. It will also depend on the state of nerves in which the belligerent countries will find themselves.



REREADING GROTIUS IN THE YEAR 1940

BY DURWARD V. SANDIFER

Assistant to the Legal Adviser of the Department of State

"We await a jurist with the mastery of the legal materials, the philosophical vision, and the juristic faith which enabled Grotius to set up a law of nations almost at one stroke," declared Dean Pound in concluding his address before the Thirty-Third Annual Meeting of the American Society of International Law on "The Idea of Law in International Relations."¹ That is a statement which challenges the attention and arouses the curiosity of a present-day international lawyer. Although accustomed as such a lawyer is to the notion of Grotius as the founder and father of the law of nations, it is a little startling to be told that the answer to the current dilemma of international law is contingent upon the advent of a jurist with his accomplishments. What is there in his *De Jure Belli ac Pacis* to warrant such confidence? What would he have to offer as a guide to a lawyer seeking to extend and to reënforce the domain of law in international relations?

The writer was impelled to go to Grotius himself for the answer—to subject the *De Jure Belli ac Pacis* to a fresh examination to see if there is in it a charter for the new as well as a pattern for the old.² Turning Grotius' pages anew with an eye upon the present in relation to the past, one finds some surprising things.

Here is a book which opens with a prayer that "the God of Peace, the God of Justice" heap upon "His Majesty, the Most Christian King of France and Navarre, Louis XIII," the distinction of having achieved "the extinction of war everywhere" and of having brought peace "not only to the nations, but also to the churches" (p. 5)—a book which closes with another prayer that God "who alone hath the power" might inscribe these teachings [of Grotius] "on the hearts of those who hold sway over the Christian world," and that he might "grant to them a mind possessing knowledge of divine and human law, and having ever before it the reflection that it hath been chosen as a servant for the rule of man, the living thing most dear to God"³ (p. 862). Yet between lie the arguments (1) that "war is in perfect accord

¹ Proceedings of the American Society of International Law, 1939, pp. 10, 23.

² The translation of Grotius' *De Jure Belli ac Pacis Libri Tres* published by the Carnegie Endowment for International Peace in 1925 in its series, "The Classics of International Law," edited by James Brown Scott, has been used for the purpose of this study. This translation is of the edition published in Amsterdam in 1646, which embodied the last revision made by Grotius. All page references given without other indication are to the Carnegie translation.

³ The validity of the latter part of this statement Grotius attests with the following note: "So [St. John] Chrysostom [Greek Father of the Church, 344-407 A. D.] in his sermon *On Alms* [beginning]: 'Man is the being dearest to God.'"

with those first principles of nature" (p. 52); (2) that right reason prohibits "only that use of force which is in conflict with society, that is which attempts to take away the rights of another" (p. 53); (3) that "the use of force which does not violate the rights of others is not unjust" (p. 54); (4) "that not all war is in conflict with the law of nature is more fully proved from sacred history" (p. 54); (5) that the foregoing theses are "proved also by the general agreement of all nations, and especially among the wise" (p. 55); (6) "that wars . . . are not condemned by the volitional law of nations, histories, and the laws and customs of all peoples fully teach us" (p. 57); (7) "that war was not in conflict with the divine volitional law before the time of the Gospel" (p. 57); (8) "that war is not in conflict with the law of the Gospel" (p. 63), and thirty pages devoted to proving it.

Here are jurists and comic poets, theologians and masters of strategy, saints and politicians, geographers and Greek gods, historians and tragedians all marching side by side, and all furnishing grist for Grotius' legal mill. Here one finds that the right of parents "to govern children embraces also the right to chastise" (p. 232), that "marriage according to the law of nature" is "such a cohabitation of a man with a woman that it places the woman under the eye of man and under his guardianship" (p. 234), and that in ancient law "the king is enjoined not to have too great a number of wives nor horses" (p. 235). Here one finds a discussion of ownership of wild animals and treasure trove serving as a prelude to the consideration of sovereignty over territory formed by alluvial deposits, avulsion, et cetera (pp. 296-298).

Yet withal the reader finds himself witnessing a virtuoso performance in the creation of a juristic treatise never equalled in the annals of legal literature. Few, if any, writers, secular or profane, legal or literary, historical or philosophical, have ever marshalled such a variegated galaxy of star performers to support their theses. Through the pages of *On the Law of War and Peace* parades the learning of all the ages. The ancient Greeks and Romans, the Chaldeans, the Africans, the Arabians, the Goths, the Egyptians, the Syrians—they are all as familiar to Grotius as his neighbor around the corner. He is never at a loss for a poet, an orator, a philosopher, to turn an apt phrase, to point in graceful language the moral he has to preach, or a jurist to drive home a legal principle with a pithy maxim. To read Grotius' text and notes and annotations is to peruse an anthology of all man's accumulated knowledge in any way remotely related to the law—and much not related to it.

The total effect of the whole performance is bewildering. The mental forces of a literal minded twentieth-century lawyer are too apt to quail before this masterly mass barrage of intellectual canister. The principles are too often lost in the parade of authorities. The law of nations is bowed down by a plethora of literary, philosophical, theological, and municipal baggage. He who rallies the courage to stay through the barrage, and who has the

discernment to see past the baggage finds much to reward his labors; but one wonders if Grotius' contribution has been made in spite of and not because of the adornment of his treatise.

The breadth and catholicity of Grotius' taste in authorities suggested an examination of the comparative influences which shaped his work. Making use of the extremely valuable "Index of Authors Cited" contained in the Carnegie Endowment's translation of Grotius' *De Jure Belli ac Pacis*, some calculations were made which produced some rather striking results. A division of the 609 authorities listed by date into time groups shows the following proportions: (1) B. C., 82—12 per cent; (2) 1 to 500 A. D., 198—33 per cent; (3) 500—1000, 37—6 per cent; (4) 1000—1300, 53—9 per cent; (5) 1300—1625, 239—40 per cent.

Of all the authorities relied on by Grotius, forty-five per cent lived and wrote in the period before 500. Only fifteen per cent wrote in the eight hundred years of the "Dark Ages" from 500 to 1300. Forty per cent of Grotius' authorities were taken from the period which was to him the "modern years" of history, 1300—1625.

These figures require a further break-down, however, for the forty per cent for this last period is misleading. Few of the some two hundred and forty writers contained in this group are cited by Grotius more than a few times each, and not more than one or two, perhaps three, separate titles by each of these authors are cited. The story is quite different for the authorities included in groups 1 and 2, that is, up to the year 500. For many of them numerous titles are used, and an even greater number of total page references given. The more numerous are listed by way of illustration, the number given, unless otherwise specified, indicating the number of different titles cited: Aristotle (Greek philosopher, 384—322 B. C.), 21; Saint Augustine (Latin Father of the Church, 354—430 A. D.), 34; Bible, Old Testament, 35 books, total page references, 367, New Testament, 23 books, total page references, 220; St. John Chrysostom (Greek Father of the Church, 344—407 A. D.), 35; Marcus Tullius Cicero (Roman philosopher and orator, 106—43 B. C.), 44; *Corpus Juris Canonici*, 95 total page references; *Corpus Juris Civilis*, 301 total page references; Demosthenes (Greek orator, 382—322 B. C.), 23; Euripides (Athenian tragic poet, 480—406 B. C.), 22; Isocrates (Attic orator, 436—338 B. C.), 13; St. Jerome (Latin Father of the Church, 340—420 A. D.), 17; Josephus (Jewish historian, 37—95 A. D.), 102 total page references; Livy (Titus Livius, Latin historian, 59 B. C.—17 A. D.), 225 total page references; Philo Judaeus (Greek philosopher, 25 B. C.), 26; Plato (Athenian philosopher, 428—347 B. C.), 11; Plutarch (Greek philosopher and biographer, 50—120 A. D.), 86; Procopius (Byzantine historian, 495—565 A. D.), 118 total page references; Lucius Annaeus Seneca (Roman philosopher, 3 B. C.—65 A. D.), 21; Publius Cornelius Tacitus (Roman historian, 55—117 A. D.), 124 total page references; Tertullian (Latin Father of the Church, 160—240 A. D.), 22.

Truly, what we have in Grotius is a modern rendering (as of 1625) of predominantly ancient principles and practice—at least ancient to us, and, it must be remembered, separated from Grotius himself by a millennium. Strangely enough, this was done with deliberation and purpose. "History in relation to our subject," says Grotius, "is useful in two ways: it supplies both illustrations and judgments. The illustrations have greater weight in proportion as they are taken from better times and better peoples; thus we have preferred ancient examples, Greek and Roman, to the rest" (p. 26). It is not intended in any way to intimate that Grotius did not make proper use of contemporary authorities and practice. He was thoroughly conversant with the "modern" theory and practice of his day. He invoked it when he deemed it relevant, but he did not hesitate to subordinate that of which he did not approve by citing more ancient examples in support of the law of nature and of nations which he expounded and which he prayed "His Majesty the Most Christian King of France" to exemplify by his acts—with no better fortune than modern jurists sometimes have with their majesties the Most Christian, and non-Christian, governments of our own time.

Classification of Grotius' assemblage of authorities according to professions reveals a situation which if found in a modern treatise on international law would undoubtedly furnish the occasion for acid comment by the omnipresent book reviewers. Although the assignment of an authority to one group or another is occasionally somewhat arbitrary, the result can be taken as reflecting with satisfactory accuracy the approximate professional complexion of the men who supplied the substance and the decoration for Grotius' treatise.⁴

Of the 609 persons listed by profession, 159, or 26 per cent are primarily authorities on religion and theology; 138, or 22.5 per cent are students or scholars of the law of one kind or another; 124, or 20.5 per cent are historians; 69, or 11 per cent are writers of literature; 47, or 8 per cent are philosophers; 28, or 4.5 per cent may be classed as essentially students of politics; 15, or 2.5 per cent are rhetoricians; 12, or 2 per cent are grammarians. The remaining 17, constituting 3 per cent of the total, include the following professions: geography (5); strategy (3); medicine (2); astronomy (2); agriculture (1); surveying (1); lexicography (1); architecture (1); antiquities (1).

This is indeed a motley array and virtually runs the gamut of the learned professions, and some not so learned, of Grotius' day, or all the days of recorded time that preceded him, for that matter. Most remarkable of all to a modern reader will be to find religion outnumbering the law. This is a fact of paramount significance in any evaluation of Grotius' work and its influence. The extent of his analysis and recital of divine law and of treatises on religious subjects is truly amazing. A number of factors account for this phenomenon.

⁴ The name of one woman appears among the authorities: Anna Comnena (1083-1148), daughter of Alexis I, Emperor of Constantinople.

In the first place, it is probable that this extensive utilization of religious authority was hardly even an occasion for comment when the First Edition made its appearance in 1625. In giving such importance to Divine law and theology Grotius was but reflecting the predominant importance of Christianity as an institution in his day. Although men did not always practice its precepts, the Christian religion furnished a considerable part of the furniture of their minds. Recognition needs to be given in this connection to the fact that many of Grotius' distinguished predecessors were Catholic jurists. In fact, it is frequently difficult if not impossible to draw the line between Churchmen and jurists. To do so in some cases would be arbitrary and artificial.

Another factor determining the extent of Grotius' reliance on religious authorities was the importance which he attached to the law of nature. That law drew heavily on Divine law. Grotius says in this respect:

I frequently appeal to the authority of the books which men inspired by God have either written or approved, nevertheless with a distinction between the Old Testament and the New. There are some who urge that the Old Testament sets forth the law of nature. Without doubt they are in error, for many of its rules come from the free will of God. And yet this is never in conflict with the true law of nature; and up to this point the Old Testament can be used as a source of the law of nature, provided we carefully distinguish between the law of God, which God sometimes executes through men, and the law of men in their relations with one another. (pp. 26-27.)

He adds, however, speaking of the New Testament:

This, however—contrary to the practice of most men—I have distinguished from the law of nature, considering it as certain that in that most holy law a greater degree of moral perfection is enjoined upon us than the law of nature, alone and by itself, would require. And nevertheless I have not omitted to note the things that are recommended to us rather than enjoined, that we may know that, while the turning aside from what has been enjoined is wrong and involves the risk of punishment, a striving for the highest excellence implies a noble purpose and will not fail of its reward. (p. 27.)

Grotius also invoked Divine law for its own sake, for he was essentially a moralist, although none the less a perspicacious legal realist. Note that he says: "I frequently appeal to the authority of the books which men inspired by God have either written or approved" (p. 26). And he adds: "The New Testament I use in order to explain—and this cannot be learned from any other source—what is permissible to Christians" (p. 27). Still further he observes:

The authentic synodical canons are collections embodying the general principles of divine law as applied to cases which come up; they either show what the divine law enjoins, or urge us to that which God would fain persuade. And this truly is the mission of the Christian Church,

to transmit those things which were transmitted to it by God, and in the way in which they were transmitted. (p. 27.)

He concludes his *Prolegomena* with this supplication:

And now if anything has here been said by me inconsistent with piety, with good morals, with Holy Writ, with the concord of the Christian Church, or with any aspect of truth, let it be as if unsaid. (p. 30.)

With his keen insight into the nature of law, Grotius was fully aware of the powerful weapon he wielded in invoking religion and Divine law. Without doubt he sought to throw behind the practical precepts which he aimed to establish as law the mighty sanction of sixteen centuries of Christian teaching. His purpose was to create an illusion of authority for the law of nations which was certainly not to be found in the consent of states in the year of grace 1625. Even the fear of God proved too frequently an inadequate restraint on monarchs sunk in the morass of the Thirty Years' War.

Grotius' use of history is noteworthy, especially considering the state of historiography at the time he was writing. To it he turned for precedents, and consciously, for he says: "History in relation to our subject is useful in two ways: it supplies both illustrations and judgments" (p. 26). At another point, after speaking of certain special books on the laws of war, he observes:

What all these writers especially lacked, the illumination of history, the very learned Faur undertook to supply in some chapters of his *Semestria*, but in a manner limited by the scope of his own work, and only through the citation of authorities. The same thing was attempted on a larger scale, and by referring a great number of examples to some general statements, by Balthazar Ayala; and still more fully, by Alberico Gentili . . .

We have taken all pains that nothing of this sort escape us; and we have also indicated the sources from which conclusions are drawn, whence it would be an easy matter to verify them, even if any point has been omitted by us. (pp. 22-23.)

His reliance upon literature is even more noteworthy, and the mathematical ten per cent of the total authorities which this group constitutes does not exaggerate its importance. For Grotius' pages glitter with literary allusions and quotations, and we have the anomalous situation of a legal treatise fairly bristling with quotations from the poets. Nor are they all used by way of adornment, for on occasion Grotius gives solemnity to a principle by turning it out in the measured meters of a Euripides or a Sophocles; or he multiplies his precedents by pulling one from the hoary lines of Homer.

The authorities were also classified according to nationality. As the nationality of some was not available, 593 are included in this tabulation. The earlier authorities are classed broadly as Greek and Roman, as the differentiation into nationalities did not become important until late in the period under consideration. Bearing this in mind, it is still significant to find

that almost fifty per cent of these authorities are Greek and Roman, and of these 25.5 per cent or 150 are Greek. As a relatively small group of these Greek authorities are cited with frequency, this means that the scholars of the golden age of Greece exercised an influence upon the shaping of Grotius' thought out of all proportion to their numerical significance. Roman influence was perhaps even greater, considering the importance of the *Corpus Juris Canonici*, the *Corpus Juris Civilis*, the Church, and the Roman and Holy Roman Empires as institutions.

The other nationalities in the order of their numerical importance are Italian (90—15 per cent); French (58—10 per cent); German (44—7.5 per cent); Spanish (39—6.5 per cent); Dutch (11), English (10), and Hebrew (11), slightly less than 2 per cent each; miscellaneous (40—6.5 per cent, including Flemish 6, Belgian 5, Portuguese 5, Swiss 3, Swedish 3, Scotch 3, Danish 2, Arabian 2, African 2, Gothic 2, Bohemian 1, Polish 1, Moorish 1, Chaldean 1, Syrian 1, Alexandrian 1, and Macedonian 1).

When we consider the extent to which the more numerous of these remaining nationalities drew upon Greek and Roman sources, it appears even more clearly that what Grotius gives us is a modern adaptation of ancient law. Our English forbears, it should be noted, had made a relatively minor contribution to the law of nations at the time Grotius was writing. The composition of the nationalities appearing in this tabulation spotlights one further fact which has often been noted, that is, that the law of nations is essentially a European creation.

The attention of the modern lawyer who reads Grotius is certain to be arrested by the extent to which he derives his law from authority. His principal source is the testimony of the learned men of various professions. The precedents he cites are taken from the historians, not from the documents. He recognizes but two sources for the law of nations: "unbroken custom and the testimony of those who are skilled in it." The law of nations is in fact, he says, quoting Dio Chrysostom (Greek rhetorician, 50 B. C.), "the creation of time and custom" (p. 44). He cites few, if any, documentary records, no correspondence of foreign offices, no treaties, no court decisions. He does use extensively the *Corpus Juris Canonici* and the *Corpus Juris Civilis*, and to some extent other municipal statutory law; but on the whole he makes remarkably meager use of what are known in the lingo of modern research as "primary sources." True, there was only a meager amount available, but even that does not seem to have impressed the all-embracing mind of Grotius.

Still another fact which stands out on page after page in rereading Grotius with an eye to what he has to offer us today is the amount of surplusage there is in his treatise. In addition to there being much that is obsolete today, there is a quantity which it is difficult to conceive as ever having had any practical relevance to the law of nations. A careful scrutiny of his pages warrants the estimate that very nearly half of Grotius' treatise is

either obsolete or never had any real relevance to his subject. It is possible that much that was irrelevant was of real interest to the readers of his day, such as his digressions on love and morality, Divine law and Holy Writ, love and chastity, private property and inheritance. He was a pioneer, and no one had circumscribed the limits of the law of nations. Still it is hard to believe that the prolix irrelevancies which make it an arduous task today to follow the basic outline of his work, did not actually detract from its value at the time that it appeared. A topical list of some of the material illustrates the point: Hebraic law and Holy Writ and arguments therefrom, right of subjects to make war against superiors, defense of chastity, law of love, rights of private property, ownership by infants and insane persons, parental authority, marriage, associations, corporations, succession and inheritance, property in wild animals, municipal law of promises, contracts and oaths, falsehood and deceit, assassination, rape, slavery.

It should be observed that Grotius' extensive treatment of domestic or municipal law appears to stem from his preoccupation with war and his aim to treat all causes of war. He says in the opening paragraphs of his treatise:

War . . . is undertaken in order to secure peace, and there is no controversy which may not give rise to war. In undertaking to treat the law of war, therefore, it will be in order to treat such controversies, of any and every kind, as are likely to arise. (p. 33.)

Later he adds: "It is evident that the sources from which wars arise are as numerous as those from which lawsuits spring; for where judicial settlement fails war begins" (p. 171).

Since lawsuits spring from controversies arising under domestic law, Grotius deemed it necessary to treat that law. This method multiplied excessively the subjects to be treated. The product may perhaps have been useful as an omnibus legal treatise, but it had the effect of obscuring the limits of the law of nations proper.

In citing precedents Grotius does not always distinguish precisely between fact and fiction, between history and mythology. Hercules and Cyclops and Atlantis are as real to him as Caesar and Gaul, at least he cites their mythological exploits with no hint of their fictional character. In all seriousness he refers to the Spartan Chiefs as descendants of Hercules (p. 112). Or again he speaks of "the engulfing of peoples by the sea, as the people of Atlantis mentioned by Plato" (p. 313).

It is difficult today to accept as useful in a legal treatise Grotius' extensive use of literary allusions. Perhaps this could be condoned except for its tendency to obscure rather than to clarify the thought. However, Grotius uses this literary material with a deliberate purpose. He says:

The views of poets and of orators do not have so great weight; and we make frequent use of them not so much for the purpose of gaining acceptance by that means for our argument, as of adding, from their words, some embellishment to that which we wished to say. (p. 26.)

And again he says:

In order to prove the existence of this law of nature, I have, furthermore, availed myself of the testimony of philosophers, historians, poets, finally also of orators. Not that confidence is to be reposed in them without discrimination; for they were accustomed to serve the interests of their sect, their subject, or their cause. But when many at different times, and in different places, affirm the same thing as certain, that ought to be referred to a universal cause; and this cause, in the lines of inquiry which we are following, must be either a correct conclusion drawn from the principles of nature, or common consent. The former points to the law of nature; the latter, to the law of nations. (pp. 23-24.)

Thus, although he nominally recognized the weakness of such testimony, he frequently uses his poets and orators to serious purpose, and in places where more serious evidence would be in order. For example, in support of the statement that a river "viewed as running water, has remained common property, so that one may drink and draw from it," he quotes from the *Art of Love* by Ovid:

Who would forbid from lighted torch a light
To take, and guarded hold in hollow sea
The waters vast? (p. 196.)

And, again from the *Metamorphoses* of the same author:

Why water me deny? Common to all
The use of water is. (p. 196.)

Later he says that in kingdoms "the kings have the right to make treaties," and for authority quotes Euripides in *The Suppliants*:

This treaty oath Adrastus needs to swear;
For having royal power, the right he has
To bind the state with treaty made by him. (p. 392.)

It must be recognized, however, that Grotius was writing for an age in which these poet philosophers, especially the Greeks and Romans, spoke with great authority. Grotius quite probably sought to lend the air of universality to his principles and precepts by showing them stated as commonplaces by the great interpreters of national life.

Grotius incidentally suggests a further possible explanation of his use of literary sources among the ancients. Speaking of the previous writings on the law of nations he observes:

Of the ancient philosophers nothing in this field remains; either of the Greeks, among whom Aristotle had composed a book with the title *Rights of War*, or—what was especially to be desired—of those who gave their allegiance to the young Christianity. Even the books of the ancient Romans on fœtal law have transmitted to us nothing of themselves except the title. (p. 22.)

Preferring the "ancient examples, Greek and Roman," as coming from "better times and better peoples," he felt it necessary to cite the practice of that time as reflected in the poets, philosophers and orators.

With all his verbiage and irrelevancies, there is a very modern ring in the statement of many of Grotius' principles.⁵ In fact, in an occasional passage there is too much of modernity for comfort. At the very outset, in the opening of his *Prolegomena*, he says in explanation of the necessity for his treatise:

Such a work is all the more necessary because in our day, as in former times, there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name. On the lips of men quite generally is the saying of Euphemus, which Thucydides quotes, that in the case of a king or imperial city nothing is unjust which is expedient. Of like implication is the statement that for those whom fortune favors might makes right, and that the administration of a state cannot be carried on without injustice. (p. 9.)

"Least of all should that be admitted," he declares, "which some people imagine, that in war all laws are in abeyance, . . . Let the laws be silent . . . in the midst of arms, but only the laws of the State, those that the courts are concerned with, that are adapted only to a state of peace; not those other laws which are of perpetual validity and suited to all times" (pp. 18-19). And here is a statement that would be enthusiastically endorsed by modern Fascists in their espousal of the "leadership principle":

To every man it is permitted to enslave himself to any one he pleases for private ownership. . . . Why, then, would it not be permitted to a people having legal competence to submit itself to some one person, or to several persons, in such a way as plainly to transfer to him the legal right to govern, retaining no vestige of that right for itself? And you should not say that such a presumption is not admissible; for we are not trying to ascertain what the presumption should be in case of doubt, but what can legally be done. (p. 103.)

Grotius is particularly modern when he speaks of the conduct of war. He remarks frankly: "So far as the manner of conducting operations is concerned violence and frightfulness are particularly suited to wars" (p. 605). How far the right to inflict injury extends, he observes, "may be perceived from the fact that the slaughter even of infants and of women is made

⁵ It is interesting to note Grotius' own observations concerning his manner of writing:

"As regards manner of expression, I wished not to disgust the reader, whose interests I continually had in mind, by adding prolixity of words to the multiplicity of matters needing to be treated. I have therefore followed, so far as I could, a mode of speaking at the same time concise and suitable for exposition, in order that those who deal with public affairs may have, as it were, in a single view both the kinds of controversies which are wont to arise and the principles by reference to which they may be decided. These points being known, it will be easy to adapt one's argument to the matter at issue, and expand it at one's pleasure." (p. 30.)

with impunity, and that this is included in the law of war" (p. 648). Such slaughter is perhaps worse today, as a result of aerial bombing, even though it may not be carried out with impunity under the law of war.

You can call the roll of many principles of modern international law and find them stated with substantial soundness in Grotius: definition of war and of law, including the law of nature and the law of nations, sovereignty, acquisition of sovereignty, accretion, avulsion, abandonment, usucaption, prescription, alienation of sovereignty over territory, cessation of sovereignty, law of treaties, interpretation of treaties, right of legation and many phases of the law of war.

Probably no one has ever seriously read Grotius without coming away deeply impressed with the intensity of his passion for justice and peace. In this, perhaps, as much, if not more than in the acumen with which he perceived and characterized the nature and practice of the modern state system, lies the secret of his tremendous influence over his successors. He gave voice to an eternal ideal at the same time that he charted the basic course of a law of nations. It is true he goes far in justifying and rationalizing so-called "just" wars, and he condones much that is hardly worthy of an evangel of peace. However, in evaluating this phase of his work it is essential to visualize clearly the wilderness of war and unrestrained ferocity in which he was raising his voice. The standards for which he sought to gain acceptance were far in advance of the practice of states in his day, if not even of our own.

The extent to which war dominated the thought of his day is graphically shown by the fact that Grotius found it necessary to take its existence and its "law" as the point of departure for his whole work. This is revealed in his own résumé of the plan of his treatise:

In the first book, having by way of introduction spoken of the origin of law, we have examined the general question, whether there is any such thing as a just war; then, in order to determine the differences between public war and private war, we found it necessary to explain the nature of sovereignty—what nations, what kings possess complete sovereignty; who possess sovereignty only in part, who with right of alienation, who otherwise; then it was necessary to speak also concerning the duty of subjects to their superiors.

The second book, having for its object to set forth all the causes from which war can arise, undertakes to explain fully what things are held in common, what may be owned in severalty; what rights persons have over persons, what obligations arise from ownership; what is the rule governing royal successions; what right is established by a pact or a contract; what is the force of treaties of alliance; what of an oath private or public, and how it is necessary to interpret these; what is due in reparations for damage done; in what the inviolability of ambassadors consists; what law controls the burial of the dead, and what is the nature of punishments.

The third book has for its subject, first, what is permissible in war. Having distinguished that which is done with impunity, or even that

which among foreign peoples is defended as lawful, from that which actually is free from fault, it proceeds to the different kinds of peace, and all compacts relating to war. (pp. 21-22.)

The law of peace is set forth in the second book as an incident to the exposition of the causes of war. It was necessary to consider peace in relation to war. War was the paramount consideration from which the law of nations stemmed. James Brown Scott, in his Introduction to the Carnegie Endowment's translation of the *De Jure Belli ac Pacis*, has put the matter aptly in these words: "If the immediate and ostensible object of Grotius was to subject the conduct of war to the rules of law, his other and less apparent purpose was to preserve uninterrupted the peace resulting from war" * (p. xxxvi).

In the dedication of his treatise to Louis XIII, Grotius reveals his awareness that he was challenging the monarchs of the earth to a higher standard of conduct than that to which they were accustomed. To Louis he says:

How noble it will be, how glorious, how joyful to your conscience, when God shall some day summon you to His kingdom, which alone is better than yours, to be able with boldness to say: "This sword I received from Thee for the defence of justice, this I give back to Thee guilty of no blood rashly shed, stainless and innocent." Hence it will come to pass that the rules which we now seek to draw from books will in the future be drawn from your acts as from a complete and perfect exemplification. (pp. 4-5.)

To a knowledge of what is just, Grotius tells us, "Euripides gives the preference over an understanding of things divine and human; for he represents Theoclymenus as being thus addressed:

For you, who know the fate of men and gods,
What is, what shall be, shameful would it be
To know not what is just." (p. 9.)

Grotius declares that "in order that wars may be justified they must be carried on with not less scrupulousness than judicial processes are wont to be" (p. 18). He condemns "aggressive" wars. "In most cases those who go to war have persuasive causes, either with or without justifiable causes," he says. "There are some indeed who clearly ignore justifiable causes. . . . To these you may fitly apply the saying of Augustine: 'To make war upon our neighbors, and thence to advance against others and from the mere lust of ruling to crush peoples who have not troubled us, what must we call this but wholesale robbery?'" (pp. 547-548.)

* In concluding his Introduction Dr. Scott observes:

"Perhaps the best comment upon his life and influence is that, although he gave war first place in the rights and duties of nations, any man writing today would give peace that predominance; in other words, the whole standard of thought has changed, peace being in conception, and bound to be in fact, the normal state of things in any system of law; whereas war is at best an abnormal condition and as such opposed to a settlement of disputes according to any system of law which is itself derived from justice." (p. xliii.)

Finally Grotius urges the necessity of good faith to the preservation of peace:

And good faith should be preserved, not only for other reasons but also in order that the hope of peace may not be done away with. For not only is every state sustained by good faith, as Cicero declares, but also that greater society of states. Aristotle truly says that, if good faith has been taken away, "all intercourse among men ceases to exist." (p. 860.)

What then has a modern "Grotius" to learn from all this? He must note first of all that his problem differs radically from that of Grotius. He has not to create a new "law of nations almost at one stroke." He starts with a fairly rounded system of law ready to hand. Grotius' achievement was that he synthesized what had gone before him and set up a framework of law within which the practice of states could be codified. A modern "Grotius" is not confronted with that pioneer task. His task, like that of Grotius, is to build on what has gone before, but the problem today is not to raise up a new body of law. It is to infuse new life into the existing body and give it impetus and direction.

The modern international lawyer can learn from Grotius the necessity of drawing from other than juristic authorities some of the meat for his law. One of the secrets of the instant acceptance of his treatise and of its continued influence was that it had in it the elements of universality, true, a faulty universality at times, but in drawing upon the wisdom of all the ages Grotius caught the vision of man where an unvarnished legal handbook would have failed. He had what too many modern international lawyers lack, what Dean Pound calls "philosophical vision." While it is not necessary to clutter up a statement of the law with the paraphernalia of their work, there is profit to be had from a knowledge of what artists, poets, novelists, theologians, *et al.* are thinking—as they may be expected to reflect the thought of their day. International law today might be invigorated by an infusion of new ideas drawn from the great scholars of professions related to the law.

The international lawyer of today needs to give close consideration to the fundamental bases of the law. Grotius relied for his "juristic faith" primarily on the law of nature. From it he drew "certain fundamental conceptions which are beyond question, so that no one can deny them without doing violence to himself" (p. 23). In defining the law of nature Grotius says that it "is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God" (p. 38). Law with such a foundation must have been very comforting to its expounder, and at the same time the cause of mental insecurity to him who transgressed it. From Grotius' time on it became increasingly necessary for those who violated the rules he formulated to justify and rationalize

such violations before the tribunal of public opinion. Unfortunately, Grotius himself furnished them too many exceptions on which to build their rationalizations.

The writer has no thought of advocating a return to the abstruse mysticism and unreality of the law of nature. A new "juristic faith" is not to be found in a return to that law, for there is no universal confidence today in its efficacy. That which furnished the "juristic faith" of Grotius' time will not suffice now.

The problem is to find a means for revitalizing the "fundamental conceptions" of the system of law bequeathed to us by Grotius and his successors and to place "beyond question" faith in those conceptions. Grotius succeeded by harnessing his law to the predominant faith in the immutability of principles "enjoined by the author of nature, God." In an age of science and skepticism may our solution not rest in a revaluation of the "fundamental conceptions" of our law in the light of a pragmatic study of their relation to the economic, social and political organization which they must serve? Dean Pound prefaced the challenge quoted at the beginning of this article with these trenchant remarks:

But we shall call for a legal philosophy taking account of the social psychology, the economics, the sociology, as well as the law and the politics of today, that shall enable international law to take in what it requires from without, yield us a functional critique of international law in terms of social ends, not an analytical critique in terms of itself, and above all, shall conceive of the legal order as a process and not as a condition. Thus it may well enable jurists of the next generation to do as much for the ordering of international relations as Grotius and his successors did in theirs.⁷

It was the failure to take account of factors other than the juridical which probably accounts, more than any other one thing, for the failure of the post-war system built around the League of Nations. A legal system of peace is not enough. That system can progress only in so far as it takes account of the social, economic, and political milieu in which it must function. Municipal lawyers are turning more and more to a broader basis for their law. They have perceived that law to be a vital force must take account of the daily social and economic life of the people for whom it is made. In the same manner international lawyers may rise above the rôle of reflecting and codifying the practice of states and achieve for international law the dynamic power needed to galvanize states to a higher level of conduct. That is essentially what Grotius did by building his law on a universal basis.

⁷ Proceedings of the American Society of International Law, 1939, p. 23.

ORIGINS OF THE FRENCH PROTECTORATE OVER CATHOLIC MISSIONS IN CHINA

BY H. M. COLE

Instructor in History, University of Chicago

One of the most distinct features of European imperialism in its nineteenth century form was the peculiar alliance between missionary activity in backward areas and the political exploitation of the same for reasons of prestige, strategy or economics. No better example of this alignment can be found than in the French protectorate exercised over Roman Catholic missionary activity in China. Here the establishment of a definite political protectorate in the nineteenth century has a long historical background in which one may trace the transition from what G. L. Beer called "The Old Colonial System" to imperialism in its modern form. The question of "origins" here follows a sequence from Portuguese conquests and the Patronage (*Padroado*) in the Far East through the period of French expansion under Louis XIV to the final acceptance by the European world of the French protectorate over all Catholic missions in China.

The religious protectorate has varied greatly in its historical and politico-legal nature. Thus the French protectorate over the Holy Places and Catholic Christians in the Near East was much different in form than that exercised in China. The latter had a more definite extraterritorial connotation, since it aimed at modifying the laws and administration of China in such a way that the foreign missionary would have the right to preach the favored religion and practice its rites, while native converts would be assured full liberty to accept and practice this faith.

On what grounds was such interference exercised by France? In general a religious protectorate has depended on either a temporal mandate from the highest spiritual authority; or, on the other hand, it has been based on "conventional and traditional authorizations given by a country for exercising that mandate on its territory," *i.e.*, a diminution of sovereignty. In the first case we have the Portuguese *Padroado*; in the second, a series of agreements between the governments of France and China, ratified and strengthened by custom and convention, dating from 1844 to 1865. Somewhere between these two forms of the religious protectorate lies the development of the "historic rights" accruing to the French crown during the seventeenth and eighteenth centuries.¹

The discoveries of Columbus and his predecessors inaugurated an epoch of controversy as to the legal rights arising from such discovery. The imme-

¹ For a discussion from the point of public law, see C. Georges Soulié, *Exterritorialité et Intérêts Étrangers en Chine*, 349-371.

diat settlement was one that could have been accepted only in an age of faith, yet it was derived from shrewd political reasoning. Since Roman law did not recognize the right of discovery, both Spain and Portugal were willing and anxious to fortify arguments from the *jus gentium* by recourse to the canon law and the temporal powers claimed by the Roman See.³ The subsequent division of the newly discovered lands between Portugal and Spain in the famous bulls of Alexander VI (1493) entailed not only the recognition of political control but the grant of a religious mandate as well. In the case of Portugal this mandate was known as the *Padroado* or Right of Patronage. A whole series of Papal bulls confirmed to Portuguese monarchs the right of control over the Church in all lands conquered by Portugal and also in such heathen territories as lay in those parts of Africa, India and Asia recognized as within the Portuguese sphere by Papal partition.³ This meant that no missionary could go thence without the permission of the King of Portugal, nor could he travel to these parts save in Portuguese ships. No episcopal sees could be established save by royal consent and no bishop or archbishop could be nominated to any benefice except by the king's "presentation." It was even claimed, although with scant canonical documentation, that no Papal bulls or letters could circulate within the area of the Patronage without royal consent. In return for the grant of such rights, the Crown of Portugal undertook to spread the Christian faith by conquest and missionary effort, give monetary support to missionary activity and protect the Christian in infidel parts.

As the Portuguese extended their empire from Africa and India towards China and Japan the Patronage grew with it. Since it was no longer possible for the Archbishop of Goa to oversee missionary efforts everywhere in the East, an episcopal see was established in the trading post at Macao. Trade goods and priests now arrived at the entrepôt in Portuguese vessels and found their way together into China, which was declared the spiritual province of the Bishop of Macao by the Bull *Super Specula* (1575).⁴ From the very first the Portuguese fiercely opposed any diminution of the Patronage, and when the Holy Father himself tried to establish other bishops in China at the end of the sixteenth century, his appointees were turned back because they lacked the *exequatur* or certification of the civil authorities at Lisbon.⁵ However, the twilight of Portuguese empire was already falling, and the next half-century saw the Patronage distinctly weakened—if never wholly destroyed. During the period 1580 to 1640 Portugal was an unwilling

³ J. Gordon, "The Bulls Distributing America," in *Papers of the American Society of Church History*, IV (1891), 81-89.

⁴ The *Padroado* was first granted by the Papacy to the *militia Christi* in the wars with the Moors. J. Richter, *Allg. Evangelische Missionsgeschichte*, IV, 48 ff. This was extended to the Portuguese rulers by Nicholas V and was reaffirmed by his successors. For the terms, see the bulls of Julius II and Leo X in Da Silva, *Corpo Diplomático Português*, IX, 90 and 370.

⁵ *Bullarium Patronatus Portugalliae Regum* (Jordao), IX, 243-245.

⁶ A. Launay, *Histoire Générale de la Société des Missions-Étrangères*, IX, 8 ff.

part of the Spanish Empire and suffered great territorial losses at the hands of the enemies of Spain. Even the Holy See finally turned its back on Portuguese pretensions, and Papal bulls modified the mandate over Asiatic Christianity.⁶ A more damaging blow was the creation of the *Sacra Congregatio de Propaganda Fide* by Gregory XV, which was manifestly designed to centralize the control of all missions directly in the hands of the Papacy.⁷ However, Portugal refused to surrender its historic rights. Throughout the seventeenth century it fought stubbornly against the encroachments of Rome, a struggle finally culminating in the schism of Goa. But, bled white by constant wars and bloody colonizing expeditions, Lisbon could neither man the mission fields nor finance activity there. At most the civil and ecclesiastical authorities in Asia could only adopt a dog-in-the-manger attitude, a policy that could not prevail when a stronger Catholic nation interested itself in the Far East.

French publicists of the nineteenth century, treating the national protectorate in China with truly patriotic fervor, generally agreed in dating the historic claims to this position from the time of Louis XIV. Certainly the France of the Sun King was ripe for such expansion, and although the Holy See took some time to accept French support (because of the Gallicanism of the French clergy, the overweening conduct of French ambassadors and the taint of the Jansenist heresy), it was nearly inevitable that France should replace Portugal. It was also logical, from the view of the Papacy, since France was rich enough and strong enough to offer real protection to the faith without having any troublesome historic claims such as the right of presentation to benefices, etc.⁸ The Congregation of the Propaganda now revived an earlier plan for creating an independent hierarchy in China under the direct control of Rome, and in 1658 Alexander VII named two Frenchmen, François Pallu and Pierre de la Motte Lambert, as apostolic bishops *in partibus infidelium*, with the right to choose a third. A decree in the following year established an apostolic See at Nanking with the ecclesiastical provinces of Peking, Shansi, Shensi, Shantung, Corea and Tartary subject to it.⁹

The French Court was only too glad to coöperate with Rome in support of the French bishops, and large sums were donated for their support while promises were made that France would act against Portuguese claims. In

⁶ H. Cordier, *Histoire des Relations de la Chine avec les Puissances Occidentales*, II, 625. However, missionaries must still travel by way of Lisbon and Goa. See C. W. Allen, *Jesuits at the Court of Peking*, 129.

⁷ See Cordier's article in *The Catholic Encyclopedia*, III, 672.

⁸ MacNair, in *China's International Relations and Other Essays*, 207, suggests that the French protectorate was first recognized by the Pole, Fr. Boym, when he applied to the French envoy at Venice, in 1652, for aid in favor of the Mings against the Manchus.

⁹ Launay, *op. cit.*, IX, 34 ff. Pallu and de la Motte were not made titular bishops, since this would bring them under the Portuguese Primate at Goa. The title of Apostolic Vicar meant that the nomination was by the Pope and that their authority was derived directly from the Holy See.

actual fact Louis XIV did little to extend the French aegis over his co-religionists in China. It is true that he granted the continuance of French civil rights to missionaries outside the country¹⁰ and that he later refused to recognize oaths of obedience rendered by the French clergy in Asia to the apostolic bishops on order of the Holy See.¹¹ But when the Portuguese imprisoned French priests or attacked them because they failed to show credentials from Lisbon, no real protests were forwarded from Paris.¹² More forceful was Pope Clement X who, tired of Portuguese treatment of his apostolic bishops, finally (1673) ordered the Archbishop of Goa to confine his jurisdiction to those territories belonging directly to the Crown of Portugal.¹³ By 1700 the French Jesuits at Peking had separated as a body from the remainder of the mission colony, who were known collectively as "Portuguese" regardless of their nationality, but this action was more the result of Papal pretensions and of the personalities involved than a definite announcement of French claims to a wholesale protectorate.

In point of fact, the fortunes of France in Asia had already anticipated the decline soon to be evident on the European continent. Dutch victories in the Indies and trouble with the Siamese had dealt a body blow to French prestige, and the commencement of the eighteenth century saw national lines amongst European missionaries in China often submerged in new constellations derived from questions of religious dogma. We may disregard the doctrinal points involved in the famous "Rites Controversy" and look only at the periphery of the question. Here at first sight the struggle over the "Rites" seems to be a four-cornered "dog-fight" between French, Portuguese and Spanish missionaries plus representatives of the Vatican. However, it does not logically resolve itself into a clear-cut issue between France and Portugal but is further obscured by differences of a monkish order amongst the religionists themselves. The Spanish Dominicans, pushing from the Philippines into China, detonated the controversy by protesting to the Pope against the Jesuit attitude towards ancestor worship. This meant that Spain, through its missionary representatives, struck a belated blow at

¹⁰ Launay, *op. cit.*, IX, 59.

¹¹ *Ibid.*, 248 ff.

¹² At this time France was in alliance with Portugal against Spain. By the treaty of 1667 the French were granted most-favored-nation treatment in the Far East and free passage for the ships of their trading companies. See the treaty, in Santarem, *Quadro Elementar das Relações Políticas e Diplomáticas de Portugal*, IV, 2:594 ff. France was more interested in the quick profits of the Far Eastern trade than in the prestige available from protecting Catholic Christians. The instructions given to the French Ambassador to Lisbon in 1669 propose a partition of Portugal's vestigial Asiatic empire, but no mention is made of missionaries or the Patronage. *Recueil des Instructions Données aux Ambassadeurs et Ministres de France*, III, 116 ff. For Louis XIV's interests in commercial and scientific intercourse with the Court of Peking, see Belevitch-Stankevitch, *Le Gôû Chinois en France au Temps de Louis XIV*, *passim*.

¹³ *Bullarium Patronatus*, II, 132.

both the Portuguese and French. The French Jesuits, who at this time were out of favor at Rome and who could expect no aid from Louis XIV—wearied by his interminable wars—were forced to let the Portuguese members of their order take up the cudgels. The struggle continued back and forth at Peking until the Inquisition decided against the Jesuitical view in 1704. Charles de Tournon, sent as Papal legate to enforce the decision, was openly defied by the Superior of the Jesuits on the grounds that he had no jurisdiction without Portuguese authorization, while the Archbishop of Goa ordered the suffragan at Macao not to receive de Tournon, since there could only be one Primate in Asia and that, from the Patronage, must be the Archbishop at Goa. During some phases of the hostilities the French opposed the Patronage, but the final settlement, by the Bull *Ex Quo Singulari* (1742), did nothing to heighten French prestige, but formally embodied the compromise worked out between Portuguese claims and those of the Papacy. Here, as the *quid pro quo*, the Papal legate sent in 1719 had received the official consent of Lisbon before sailing to Asia, and three years earlier Clement XI allowed the creation of three new bishoprics in China under Portuguese control.¹⁴

The accession of the Emperor Yung Cheng in 1722 brought sad days for all the missions, and the work which had seemed so prosperous in the preceding century was reduced by imperial persecution to furtive proselyting in disguise. French influence during this period was confined to the Jesuit mission at Peking, but was destroyed by the abolition of the order (1773), and the Lazarists who took over the work labored in vain to restore French prestige in China. Although more ships were trading between Marseille and Canton, the monarchy was too busy at home to lend active support to either commercial or religious ventures so far away, and in 1779 the French ambassador at Lisbon was ordered to commend his countrymen in China to the protection of the Queen of Portugal. It must be said that the Portuguese governors at Macao did all they could to offer succor to the French priests hunted from the mainland by Chinese officials, but at the end of the century they were called upon less and less as the Jacobins and Napoleon diverted aid from the moribund Lazarist Order.¹⁵

With the Restoration in Europe and a revival of monarchical interest in affairs of the Church, French Lazarists began to dominate the Catholic mission field in China. During the reign of Louis XVIII the bishops of Macao, Peking and Nanking were still nominated by the Crown of Portugal, but, weakened by a century of persecution and the Carlist troubles in Portugal

¹⁴ *Bullarium Patronatus*, III, 150 ff. The doctrinal aspects of the "Rites," revolving around the Chinese terms to be used for "God" and the participation of converts in Confucian ceremonies, is fully recounted in Allen, *op. cit.*, Chaps. X-XVI, *passim*. Cf. * * *, "Les Missions Catholiques en Chine et le Protectorat de la France," in *Revue des Deux Mondes*, Dec. 15, 1886, 769-798.

¹⁵ Launay, *op. cit.*, 2:222. The French consul, established at Canton in 1776, took an interest in religious affairs as French consuls had traditionally done in the Near East, Soulié, *op. cit.*, 353.

itself, which effectively cut off any financial or diplomatic aid, the Patronage was no longer an effective institution. When it ceased to exist is a difficult question, since the Patronage was much more amorphous than even the French protectorate that succeeded it, but for all practical purposes Portuguese claims ended with the investiture of a French Lazarist, Mgr. Mouly, in 1846 as chief administrator of the missions.¹⁶

It is apparent, then, that the last and most important stage in the establishment of a French protectorate over Catholic missions in China saw France without any serious rival to oppose its claim—something that cannot be said for any earlier epoch. The process of historical gestation had been important for the formation of a general idea, most far-reaching probably in the creation of a body of public opinion within France itself, which accorded a sort of vested interest in China to French missionaries and the French kings under whose protection they labored. This meant that appeals would be directed to Louis XVIII and his successors to “continue” the royal “protection” afforded by Louis XIV.¹⁷ Doubtless such tradition was important, but any real exercise of the protectorate in the nineteenth century was based on the growth of the new body of tradition and the international prestige derived from and coincident with the creation and application of definite treaty rights.¹⁸ This peculiar position of France relative to the Catholic faith in China was, therefore, expansive, as contractual rights and historic precedents accumulated, and may be said to coincide with the so-called “Treaty Period” in which is drafted the “Charter of French Missions.”¹⁹ There are four parts to this: (i) Art. 22 of the Treaty of Whampoa, 1844; (ii) Art. 13 of the Treaty of Tientsin, 1858; (iii) Art. 6 of the Convention of Peking, 1860; (iv) The Berthemy Convention of 1865.

Strangely enough, the first active interest shown by the French Government in China, during the nineteenth century, had no reference to missions or missionaries. Prior to 1840 the interests of the bourgeois Second Empire had been centered in Algeria, and it was not until 1842 that Admiral Cecille headed the first expedition sent to gather data on possibilities for French

¹⁶ French writers have argued that the Patronage entailed a contractual obligation and did not bestow an absolute right. Therefore Portugal vacated its privileged position when it could not carry out the duties attached, such as building churches, providing missionaries, etc. In 1821, for example, the officials at Macao refused to allow priests to cross to Canton fearing that this might cause an official embargo against Portuguese traders. See the *Annales de l'Association de la Propagation de la Foi*, I, 2:15. Portugal never officially recognized the French position until 1876, when the Bishop of Macao applied for a French passport for a Portuguese priest. Cordier, *Relations*, II, 637. The Patronage was ended in India by a concordat in 1928. The New Catholic Dictionary, 719.

¹⁷ See the *Annales*, cited above, III, 11 ff. and VI, 11 ff.

¹⁸ The French Foreign Office used both traditional claims and treaty law. *Documents Diplomatiques Français, 1871-1914*, 2 série, IV, 181.

¹⁹ The term coined by Cordier in his *Histoire des Relations de la Chine avec les Puissances Occidentales*, I, 75. Cordier adds the Bull *Ex Quo Singulari*, but I do not find that French claims were ever based on this last.

interests in China. The representatives of the chambers of commerce and the publicists impelled Thiers to send along a special mission under Lagrene, acting as minister plenipotentiary. The object of the expedition was: "exclusively commercial . . . to obtain for French navigation and commerce not only the same advantages but the same guarantees which the English had obtained (by the Treaty of Nanking, 1842); a treaty of commerce by which that empire (China) would be bound to France as it was bound to England."²⁰ It would seem, then, that the Lagrene mission had no definite aim in view save to obtain the advantages gained by other nations, notably England, and to obtain a site in the Far East where France might found "a military establishment for her navy and an entrepôt for her commerce."²¹

Lagrene's instructions contained not a word concerning missions or Catholicism. Why, then, did these things appear in the treaty which Lagrene negotiated at Whampoa (October 24, 1844)? The year 1840 had seen a recrudescence of hatred and persecution against Christianity in the provinces,²² and evidently the Lazarists besought Lagrene's support as soon as he landed at Macao.²³ Also, there is every reason to believe that Admiral Cecille encouraged and supported the missionaries, for in 1844 he landed without orders in Corea and abruptly ordered the Corean Emperor to cease all persecution of the Christians.²⁴ However, Lagrene's instructions did not permit him to force the matter of the missions on Peking and he was able only to intimate to the Chinese diplomat, Ki-Ying, that China might win the friendship of the French Emperor by making concessions to his religion and his co-religionists.

These concessions appear in Article 22 of the Whampoa Treaty and in a special Imperial edict of 1845. Article 22 provided that the French should be allowed to establish churches, hospitals, schools and cemeteries at the five treaty ports and that they could rent land. Also, "if the Chinese violate or destroy the French churches or cemeteries the guilty ones shall be punished with all the rigour of the law of the land."²⁵ This article guaranteed the right of practicing Catholicism in the treaty ports, and by implication (*viz.*, the building of churches) allowed preaching to be carried on.

This was not enough for Lagrene, who, during the negotiations of the treaty of 1844, had suggested in a letter to Ki-Ying that there were certain

²⁰ Émile Bourgeois, *Manuel Historique de Politique Étrangère*, III, 579. The French clergy never tired of pointing to the commercial advantages which they alleged the English had derived from their "Bible Societies." *Annales*, VI, 12.

²¹ Delegates from the Chambers of Commerce of Rheims, Lyons, Paris, etc., accompanied the mission and Guizot sent along an inspector of customs. Cordier, *Hist. Générale*, IV, 22 ff. ²² Fernand Mourret, *Histoire Générale de l'Église*, VIII, 320.

²³ Bourgeois, *op. cit.*, III, 579.

²⁴ Mourret, *op. cit.*, VIII, 321.

²⁵ Inspector General of Customs, Treaties, Conventions, etc., Between China and Foreign States, I, 782-783. The English treaties of 1842-44 made no mention of missions. The American treaty of Wanghsia had the same provisions as the French treaty only in more general terms. The American treaty was of no value to Catholic Christians at this time.

laws and traditions "opposed to the development of the destinies of China . . . obstacles to the relations which could be formed between your country and other kingdoms," which a wise and patriotic statesman would try to abrogate.²⁶ Obviously the Frenchman referred to the edict of Yung Cheng which had made Christianity unlawful in the Empire, and Ki-Ying replied in almost the exact words used in the edict of the following year, that "Christianity was not an heretical sect" and that it should be legalized.²⁷ However, he was anxious to so regulate the Christian religion that native Christians would not be exempt from the common code,²⁸ and Lagrene stated categorically that he was willing to recognize that Chinese Christians should be amenable to their own law.²⁹ Ki-Ying, far-seeing statesman that he seems to have been, had placed his finger upon the greatest danger inherent in the establishment of the French protectorate over native Christians. At Ki-Ying's instigation the Court at Peking decided to revoke the law making Christianity a crime, and in August, 1845, Lagrene was notified to this effect.³⁰ Now appears the first effort of a French diplomatic representative to apply pressure to the Imperial Government in favor of the Chinese Christians who were to come under the French aegis. Lagrene "demanded" that an Imperial decree be promulgated guaranteeing the free exercise of the Christian religion, and this was given in December, 1845. A second edict followed on February 20, 1846, promising the restitution of all Christian churches that had been confiscated in the century and a quarter since K'ang Hsi—if ownership could be proved.³¹ If this last provision had been literally carried out, a revolution might have resulted, for the church property accumulated in the seventeenth century had changed hands many times since then. In practice, these two edicts remained a dead letter and were never enforced until they were inscribed in the treaty of 1860, or, in other words, until the French had better legal grounds for demanding their enforcement.

However, Lagrene's efforts were far from fruitless. In the opinion of a French publicist writing shortly after the event:

The edict of 1845 . . . is a powerful weapon in the hands of France by means of which it is possible for us to intervene regularly in the internal affairs of the Celestial Empire, to demand satisfaction for the murder of our missionaries and to avenge insults inflicted on our faith. "The edict" must be considered not only as an honorable act of religious protection but more essentially as a great political act.

²⁶ Callery, J. M., *Correspondance Diplomatique Chinoise Relative aux Négociations du Traité de Whampoa*, 44 ff. It is quite untrue that the initiative for the revocation of the edict of 1724 came from Ki-Ying, as a French Catholic writer suggests, *Revue des Deux Mondes*, Dec. 15, 1886, 779.

²⁷ Callery, *op. cit.*, 51. The first draft of the edict for the toleration of Christianity is dated Dec. 28, 1844. The text is translated in the Chinese Repository, XIV (1845), 195-198.

²⁸ *Ibid.*, 51.

²⁹ *Ibid.*, 72.

³⁰ *Ibid.*, 114 ff.

³¹ Mourret, *Hist. Générale*, VIII, 320.

He holds further that the edict of 1845 is the reason why England received French aid in the war against China in 1856: "All acts of persecution constitute a violation of the treaties and it is our right to demand that they be taken into account."³² Obviously this is muddled reasoning, for the edict was not an international agreement but merely an internal ordinance handed down by the central government for the guidance of the provincial authorities. The edict, however, was actually used by France in 1858 as is indicated above.

It would seem that the "demands" in Lagrene's correspondence with Ki-Ying instituted a wide departure from the solidly bourgeois commercial mission sent out to China by the Citizen King Louis Philippe. How did French policy come to take this slant? Representatives of the mills and factories of France were sent to China in 1843 with the avowed aim of increasing French commerce, and less than two years later the French plenipotentiary successfully inaugurated the pretensions of his country to defend the interests of the Church in the Celestial Empire. The question is a perplexing one, taking into account such intangible elements as tradition, prestige and vanity. First, what was the attitude of the home government or its premier, M. Guizot, toward the policy followed by Lagrene? Guizot was a Protestant and he certainly did not order that the religious clauses be put in the treaty of 1844, but having seen this done, did he consent to Lagrene's obtaining the two important edicts? Bourgeois says that he did not and that French policy took this bent quite unconsciously.³³ Mourret, the Catholic historian, says that Guizot approved of these measures.³⁴ Unfortunately, Guizot's own memoirs are blank on this question, but at any rate the year 1843 had seen the extension of the French protectorate of missions in Oceania and the Holy Land and Guizot had supported such a policy in the Chamber, saying: "I do not see why France should not become the protectress of the Catholic religion in the world. It is her history, it is her tradition."³⁵ It is logical, therefore, to assume that Guizot never actively opposed Lagrene's policy.

How did Lagrene come to interest himself in the cause of missions? It has already been shown that France had no continuous traditions of a religious protectorate in China, such as had grown up around the French lilies or the tri-color in Algeria, Egypt and the Near East. It should also be noticed that Christianity in the Celestial Empire was at a very low ebb in the beginning years of the nineteenth century and that the Jesuits at Peking no longer exerted tremendous influence over the Imperial Government, as they had two hundred years before. Actually there would seem to be little profit in asserting French control over the missions, but evidently Lagrene

³² Lavollee, M. C., "*De la Politique de la France en Asie à Propos de la Guerre de Chine*," in *Revue des Deux Mondes*, March 1, 1858, 203.

³³ Bourgeois, *Manuel Historique*, III, 580.

³⁴ Mourret, *op. cit.*, VIII, 320.

³⁵ Bourgeois, *op. cit.*, III, 577 ff.

thought otherwise. Perhaps, as noticed above, his decision was influenced by the Lazarist missionaries, supported by Admiral Cecille. Perhaps his own personal ambitions for advancement in the diplomatic service, aided and abetted by the ambitions of Cecille, played no small part. Probably the most important determining factor was the age-old tradition that the French soldier or diplomat abroad was the defender of the Church—and undoubtedly Lagrene was steeped in that tradition. Pepin and his heirs had been given the proud title "Protector of the Church"; Tasso was justified in calling the Crusaders "the French people," and the citizens of modern France were proud that she was recognized by the Holy See as "the eldest daughter of the Church." The effect of tradition on public policy is at best a nebulous thing, but there is little question that it determined Lagrene's actions in 1844-45 and played a dominating rôle in the development of the French protectorate of missions from that time forward.

It should be noticed, however, that the time was particularly opportune for establishing French hegemony over Catholicism in China. England had disregarded missions in its treaties of 1842-43 as a matter of policy. The religious clauses in the American treaty of Wanghsia, which preceded the French treaty, may have served as a model for Lagrene's negotiations, but they were of little effect as to Catholicism because the United States was a Protestant Power. Portugal might have forestalled France, or at least have divided the right of protecting Catholic missionaries, if the question of sovereignty over Macao had not barred treaty relations between Portugal and China in 1844.³⁶ As it was, France was the only *Catholic* nation to incorporate clauses favoring and protecting mission work in these first treaties with China. This meant that Catholic missions in China were to have a distinctly French character, just as the later Protestant missions were to be predominantly American.³⁷

M. Lagrene, probably acting on his own initiative, had founded the French protectorate, but all the vicissitudes of political changes at Paris were not to change the intense interest shown by the home government from 1844 onward in maintaining and extending this privileged position—at least until the first decade of the twentieth century. It was to become increasingly a symbol of national prestige and the cornerstone of French power in China and the Far East as a whole.

The motive of the French in establishing the Protectorate was, obviously, not so much zeal for the faith as a desire for prestige and power. French trade with China was not large, and, as in Cambodia, Annam, and Tongking, the chief basis for insisting that France be heard by the authorities was the claim to the guardianship over Roman Catholic missionaries. Even when, under the Third Republic, the French Government at home became first suspicious of and then hostile

³⁶ Morse and MacNair, *Far Eastern International Relations*, 138.

³⁷ Latourette, *A History of Christian Missions in China*, 305. Throughout this article reference to "missions" and "Christianity" means Catholicism.

to the Church, French representatives in China continued to support it.³⁸

The natural French pride in *la Patrie* and love for the Church were skillfully played upon by the propaganda of such Catholic journals as *Le Correspondant*, the *Univers* and the *Revue des Deux Mondes*. France was once more the "*Soldat de l'Église*" in infidel China as centuries before in Palestine. French gold was as freely given for the support of missions in China as her diplomatic and military support.³⁹

Thus while England and Russia conquered new realms for their commerce and for their laws (in China), the French protected or conquered Christians for the Church. . . . Obligated by the suspicion of their neighbors, and the prudent councils of Louis Philippe, to abandon the heritage of the Revolution, they listened to the appeal which the Catholic writers addressed to them, awakening the echoes of a distant past—the call to the Crusade, to the evangelization of the infidels by the word or by force. *Gesta Dei per Francos*, became the flattering formula by which, since 1840, the Catholic press caressed their *amour propre*.⁴⁰

During the years following the revocation of the edict of Yung Cheng, Catholic missions flourished in China. Most of the recruits for the field were from French seminaries, the Jesuits returning to the district around Shanghai in 1843,⁴¹ the French Lazarists reestablishing the churches at Tientsin and Peking, and the strong society of the *Missions-Étrangères* laboring in the south and west of China. Probably the greatest (and most markedly French) work was accomplished by the priests from this Paris seminary who set up vicariates in the provinces, built schools, churches and seminaries, and cared for orphans and the sick.⁴² The efficacy of French diplomatic guardianship of the missionaries was demonstrated at least once during this period by the celebrated case of the Lazarists Huc and Gabet. Seized by Chinese authorities on the borders of Tibet, they were returned to Canton in what amounted to a triumphal procession, after French representations to high Chinese officials. It should be noticed in this connection that all missionary work outside the immediate vicinity of the treaty ports was contrary to Article 23 of the Whampoa Treaty, which provided that if Frenchmen ventured into the interior they should be apprehended by the provincial officials and returned unharmed to the nearest treaty port.⁴³ Thus proselyting in the provinces by French priests was really as illegal as it had been prior to the proclamation of 1845, but mission work was carried on there unmolested until about 1852.

³⁸ Latourette, *A History of Christian Missions in China*, 306.

³⁹ Bourgeois, *Manuel Historique*, III, 575. In the fifty years from 1822 to 1872 the Propaganda received 150 million francs for work in China, of which over 100 million came from France.

⁴⁰ *Ibid.*, 574.

⁴¹ Bourgeois, *op. cit.*, III, 566.

⁴² Richter, *Allg. Missionsgeschichte*, IV, 512.

⁴³ Mayers, W. F., *Treaties Between the Empire of China and Foreign Powers*, 55 ff.

In that year the Emperor Feng Hsien secretly revived the ancient laws against the Christians by letters to the provincial governors. The local mandarins were only too glad to disregard the previous edicts, and allowed brigands and bands of hostile villagers to pillage and destroy in the Christian communities.⁴⁴ The inevitable happened in February, 1856, when the French priest, Chapdelaine, was seized by a local official in the province of Kwangsi, which had always opposed the introduction of Christianity, and subjected to torture and finally beheaded.⁴⁵ His murder came as a godsend to French diplomacy in China. Although Chapdelaine had no right to travel in the interior and did so with full knowledge of his own danger, his martyrdom was sufficient pretext for furthering the prestige and the egoistic policy of France. The treaties of 1842-44 had long ceased to meet the demands of foreign merchants and diplomats, particularly in the matter of diplomatic communication with the Imperial Government. As early as 1854 France and England had instituted a joint campaign for the revision of the treaties, but personal differences between the two plenipotentiaries and the Crimean War had prevented any effective action.⁴⁶ The interests of the two countries were decidedly different but not at variance, although their representatives in China might not agree. England was chiefly interested in more favorable conditions for carrying on her growing commerce, while the Catholic missions were almost the only object of solicitude for the French in China, her shipping companies and commercial concerns not being established until after 1860.⁴⁷ Chapdelaine's murder gave opportunity for the two Powers to unite for common intervention, a union not unpleasing to Napoleon III, who had cultivated a policy of common action with England since the Crimean War.⁴⁸

In October, 1856, the English attacked the native city of Canton, and France, though a neutral, extended her protection to all missionaries in the vicinity, giving them refuge at the consulate. This would seem to be the first instance where French protection was extended to Catholic missionaries of *all* nationalities.⁴⁹ As the vague rumors of Chapdelaine's murder were fully confirmed, Comte de Bourboulon (French envoy in China) received instructions from Paris, December 25, 1856, that France could not tolerate the breach of "the essential stipulations of our treaty with China" (sic!), and that it was absolutely necessary to guarantee the security of French missionaries. Bourboulon was not to act alone but should obtain the coöperation of the envoys of the other Powers. France should, therefore, join with England, then engaged in active military measures.⁵⁰ This policy was quite in line with Bourboulon's own ideas, for in the previous July he had written to Paris that now was the time to secure complete liberty of

⁴⁴ Mourret, VIII, 648.

⁴⁵ Cordier, H., *L'Expédition de Chine de 1857-58*, 19 ff.

⁴⁶ *Ibid.*, 5.

⁴⁷ Cordier, *Hist. Générale*, IV, 109.

⁴⁸ Morse and MacNair, *op. cit.*, 185.

⁴⁹ Cordier, *L'Expédition de Chine*, 56.

⁵⁰ *Ibid.*, 99.

residence for missionaries in all the Empire; "to repair, at a single blow, the errors or faults of the past and to use the martyrdom of one missionary to completely liberate Christianity."⁵¹

Demands were made on the Viceroy, Yeh, at Macao, that compensation be paid for the murder of Chapdelaine, who had been executed contrary to Article 23 of the treaty, and that the guilty officials be punished.⁵² These demands were refused, and France joined its armaments in China with those of England. The instructions given to Baron Gros, newly appointed French plenipotentiary, definitely show that by this time (May, 1857) the whole struggle was crystallizing around the right of diplomatic residence at Peking. Chapdelaine's murder had become a wedge to open the Forbidden City.⁵³

This whole incident would seem to be a perfect example of the exploitation of the missionary in the imperialistic interests of his country, but there were extenuating circumstances, and the use of Chapdelaine's death as an excuse for the Peking Convention is hardly so "grotesque" as Richter styles it.⁵⁴ His execution was obviously a flagrant violation of China's treaty agreements and the demand for compensation seems justified. Perhaps forcing foreign diplomatic representatives upon the Imperial Government at Peking was much too large a "compensation," but in the case of France this was rather apropos, since her diplomatic connections with China for many years following were to be largely employed on behalf of the missionaries. On the other hand, the whole incident was cleverly exploited to enhance French prestige and to demonstrate to China and the Powers that France had as definite a claim to consideration in China as did England or Russia. At this time Napoleon III was trying to resurrect some of the glory that had surrounded the First Empire, and the nationalist stop was played upon with success. The shades of Dupleix, Bussy and the French Jesuits at Peking were acclaimed as figures of a time when France had been powerful in Asia. Now, it was mournfully pointed out, Spain and Holland had a greater place in the Far East than had France. Therefore, France must exert herself in China. Napoleon III was also faced with the difficult task of rallying the Catholics to his support at home. Chapdelaine's martyrdom and the resultant war with China offered a marvelous opportunity to pose as the great and good friend of Mother Church. Why did France go to war with "a vast empire located on the other side of the world"? Lavollée, writing in 1858, gave the popular answer: "It is not sufficient for us to admire the heroism of martyrs; France is traditionally the official protectress of Catholicism in China, the avowed patron of the Christians all over the Celestial Empire: she has contracted a solemn obligation."⁵⁵

France fulfilled a part of her "solemn obligation" to protect missions by the Treaty of Tientsin, negotiated in June, 1858, but she also assumed

⁵¹ Cordier, *L'Expédition de Chine*, 27.

⁵² *Ibid.*, 29.

⁵³ *Ibid.*, 145-151.

⁵⁴ *Allg. Missionsgeschichte*, IV, 106.

⁵⁵ *Revue des Deux Mondes*, March 1, 1858, 204.

new duties as their guardian. Six meetings were held between Baron Gros and the Chinese representative, Pi-Hên, from the 15th to the 23rd of June, 1858. Two phases of the missionary question were considered and finally incorporated in the treaty as Articles 8 and 13. The first provided that French subjects might travel in the interior of China on passports delivered to them by the proper French diplomatic agents.⁵⁶ At first sight this clause does not seem to have special application to the protection of missionaries, but by actual usage it came to mean that *all* Catholic missionaries journeyed and resided in the interior by right of passports delivered to them by the various French consuls; in the first instance because no other Catholic nation had the right to grant passports until long after the French treaty of 1858. Article 13 provided for the freedom of the Christian religion in the Chinese Empire:

The Christian religion having for its essential object inducing men to practice virtue, members of all Christian communions shall enjoy complete security for their persons, their properties and the free exercise of their religious practices; and effective protection will be given to missionaries who conduct themselves peaceably in the interior of the country, bearing the regular passports mentioned in Article 8.

Also, any Chinese might embrace and practice Christianity without penalty, and these rights were duly inscribed in the treaty, for Baron Gros was determined to secure something more effective than the abortive edict of 1845. The treaty read that: "All which has been previously written, proclaimed or published in China by order of the Government against the Christian cult is completely abrogated and remains without force in all the provinces of the Empire."⁵⁷ In other words, any persecutions, or legal actions against a Chinese arising from the fact that he was a Christian, were expressly prohibited by international agreement between France and China; and the former might intervene to prevent such contravention of the agreement, surely a possible source of danger to free exercise of Chinese sovereignty. However, Pi-Hên paid no attention to this in his negotiations with Gros but rather concerned himself to find a way to abolish the former Imperial rescripts without hurting the Imperial "face." Eventually the right character was found and the ancient edicts were annulled "by order of the government."⁵⁸ Finally, in an additional article to the treaty the magistrate responsible was degraded for Chapdelaine's murder—thus establishing another "traditional" right of the protectorate.⁵⁹

What were the total results obtained by France in 1858 as regards the establishment of her guardianship over Christianity in China? First and foremost the French Government had definitely shown that it intended to make the protection of missions its chief policy in the conduct of diplomatic

⁵⁶ Mayers, *Treaties*, 61.

⁵⁷ *Ibid.*, 62 ff.

⁵⁸ Cordier, *L'Expédition de Chine*, 427, 429-430, 431-433.

⁵⁹ Hertslet, *G. E. P., China Treaties*, I, 285.

relations with the Chinese Empire. Second, it had extended the right to preach from the limited area of the treaty ports to the entire realm. By the provisions relating to passports France not only gained a valuable diplomatic privilege but also made her position unique as the first and, for some years, the only Catholic Power which could give passports allowing missionaries access to the interior. The clauses giving Chinese Christians the right to practice their religion without persecution or penalty made France in effect the actual guardian of every native Christian, probably as important a privilege as the issuance of passports. These things all helped to establish the legal basis for the right of protectorship (although its "legality" was questionable) and, combined with the initiation of certain customary policies followed by French representatives from this period on, constitute a wide extension of the protectorate as originated in 1844. The customary policies referred to are: (1) the demand for compensation in case of the murder of missionaries or the destruction of mission property (claims were later made in cases where the missionary was not French but held a French passport); and (2) the use of force or diplomatic pressure to gain favorable concessions for the missions, even beyond that necessary for the actual protection of the missionaries as French nationals.

The gains made by France in 1858 were not sufficient in the estimation of Napoleon III. There was no logical reason why the French had to join in the expedition of 1859-60, when they might easily have followed the Russian example and deserted the Concert of 1858, but during these years Napoleon's parliamentary position was being attacked at home and he was compelled to throw another sop to the Catholics. Obviously, if he could install a French Minister at Peking to look after Catholic interests he might find his gesture well rewarded. Catholic leaders in France had continually assailed their Emperor for his indifference to the Pope's temporal status in Italy, and when Mgr. Mouly (head of the Lazarists in China and counselor to Baron Gros) intimated that such negligence might be forgiven if the campaign be carried to Peking, Napoleon acted accordingly.⁶⁰

The combined Anglo-French expedition to Peking was successful and the Tientsin treaties were ratified in the Forbidden City, October, 1860. However, the whole affair had been rather costly and both the French and English exacted indemnities to still the clamors of the taxpayers in the homeland. The representatives of both countries acted quite in accordance with their national policies in seeking additional compensation to show as the fruits of the campaign. England demanded and received the cession of Kowloon, while France added Article 6 to the supplementary Convention of Peking as a boon to the missions.

This article of the convention has been much discussed because of the complications attendant on its redaction. The French text reads in translation:

⁶⁰ Bourgeois, *Manuel Historique*, III, 633 ff.

Conforming to the imperial edict given March 20th, 1846, by the august Emperor Tao Kwang, the religious and benevolent establishments which have been confiscated from Christians during the persecutions of which they have been the victims will be returned to their proprietors by the mediation of His Excellency the French Minister in China, to whom the Imperial (Chinese) Government will deliver them with the cemeteries and the other edifices appertaining thereto.⁶¹

Like Article 13 of the Tientsin Treaty, this clause only put into effect provisions which by proclamation were already in the body of Chinese law, making it possible for France to insist upon their application. Far more important in effect was an extra clause which appeared in the Chinese text of the above article. This reads: "It is, in addition, permitted to French missionaries to rent and purchase land in all the provinces, and to erect buildings thereon at pleasure."⁶² It is generally believed that the French priest who was employed to translate the convention into Chinese inserted the above clause. The change was not discovered until several months later when some French missionaries referred to it in support of their claims.⁶³ Legally speaking, the addition was absolutely without value, since Article 3 of the treaty of 1858 made the French version binding in case of dispute.⁶⁴ However, the French Government insisted upon its application, and probably the Chinese Government did not greatly demur at the time.⁶⁵ The importance of this interpolated clause becomes apparent when we consider that in the nineteenth century no other treaty gave missionaries the right to live in the interior of China. By a broad use of the "most favored nation" clause it became available to all the treaty Powers and was used by them (with the exception of Russia).⁶⁶ It seems necessary to conclude with Thomson that "the claim of the missionaries of all the Western Powers to proceed into and to erect churches and mission buildings in the interior, although acquiesced in by the Chinese for so long a period as to have become almost a prescriptive right, is based on an article fraudulently inserted" in the Chinese version of the convention of 1860.⁶⁷

⁶¹ Hertalet, *China Treaties*, I, 289.

⁶² Mayers, *Treaties*, note, p. 73. The Chinese text as it appears in Mayers differs in other respects. It gives the date of the Imperial edict as Feb. 20 instead of March 20, provides for the punishment of "all such as indiscriminately arrest Christians," and states that the confiscated property shall be paid for.

⁶³ Thomson, H. C., *The Case for China*, 190. The interpreter of the legation, M. de Meritens, and the Abbé Delamarre may have been responsible. (Soulié, *op. cit.*, 357.)

⁶⁴ Mayers, *op. cit.*, 60.

⁶⁵ Holcombe, Acting Minister of the United States in China, has asserted that the interpolation "was never taken advantage of . . . by either the American, British or French governments. The French Minister at Peking officially notified the Chinese authorities that his government recognized the spurious character of the clause and would claim no rights under it. The notorious interpolated clause in the French Treaty of 1858 has played no part whatever in the establishment of missionaries in interior districts."

⁶⁶ *Ibid.*, 190.

⁶⁷ *Ibid.*, 187 ff.

Napoleon III had been more successful, as a result of the campaign of 1859-60, than even his own representatives realized at the time. By the legitimate provisions of the Convention of Peking, handsome compensation was paid for the murder of Chapdelaine, setting a precedent for the extortion of large sums from the Chinese Government in the future. Also, the provision that the confiscated property belonging to Christians should be returned to them through the agency of the French Government was in effect a recognition that it represented the Chinese Christians even before their own government. In the third place, France could now make demands for the protection or indemnification of native Christians directly to the high government authorities at Peking, since a French minister was resident there and the agreements of 1858 and 1860 gave the necessary pretext. France could be a much more effective and glorious guardian of missions in the Imperial City than in the suburbs of Canton. As to the fraudulent clause in the Chinese text, its value was self-evident and it would be too much to expect that it should not be used by the missionaries, even if French officials recognized its illegitimate character. Here it must be remembered that France had just defeated China in a war which was largely *opera bouffe*, while the apparent apathy of the Chinese official hierarchy was a direct invitation to make the fraudulent clause a concession for which the missionaries must kow-tow to France.

One feature of the Peking settlement had still to be regulated. It was obvious that Article 6 of the Convention of 1860 could not be put into effect without upsetting the whole system of land-holding in China, for Christian titles to lands and property had lain dormant for over a century and a half. At the same time the missionaries were anxious to acquire sites for building purposes, and so brought pressure to bear through French officials. The Chinese Government was willing to allow some land sales for churches, etc., but was anxious to prevent such real estate from becoming a source of speculation and profit. Finally, in 1865 an agreement was reached in the so-called Berthemey Convention which provided for the sale of real property in such a way that the realty would be held corporately by the *collective mission*.⁶⁸

The French protectorate was now firmly established by virtue of the international attitude toward the religious clauses in the Franco-Chinese treaties. Precedents had been enacted which in due time could be sanctified as traditions. A real mandate from the spiritual authority, *i.e.*, the Pope, was not forthcoming in a categorical form until 1888, but the Holy See may be said to have recognized the French protectorate as a result of the Tientsin Treaty.⁶⁹ After all, the Third Empire was the greatest Catholic Power in Europe and the only Catholic Power in China. Therefore, it is not surprising that the Holy See thanked Napoleon III for "having put his supremacy and his force at the service of the faith and of charity,"⁷⁰ and in later years the

⁶⁸ Cordier, *Relations*, I, 68-78.

⁶⁹ Mourret, *op. cit.*, IX, 314.

⁷⁰ Bourgeois, *op. cit.*, III, 586.

Papacy considered that France enjoyed its exclusive mandate to protect Catholics from the treaty of 1858,⁷¹ although the formal announcement was given thirty years later.

The final French treaty at Peking and its appended convention has been called the "Magna Charta" of Christian missions⁷²—from which dated a new era of missionary effort—but it was also the legal justification for the conduct of the protectorate. In 1858 France was the only nation legally entitled to grant missionary passports without regard to nationality. In 1860 her peculiar position was recognized by the Powers when France alone insisted on indemnities for the missionaries, rebuilding of churches, etc., and restitutions to Chinese Christians.⁷³ In 1861 France first used the right granted three years before to give passports, and 28 missionaries, already long residing secretly in the empire, received their passports from Baron Gros; one of these was not French but a Hollander.⁷⁴ Until 1888 France was the only nation to possess the privilege of giving special passports to missionaries, with the exception of Belgium which did not exercise this right.

The protectorate was now so firmly established that the *Moniteur* of January 11, 1861, could point to the concessions of 1860 and praise "the solicitude of the government of the Emperor for the religious interests placed under the traditional protection of France in the Far East,"⁷⁵ forgetting that this tradition had a very tenuous connection with the age of Louis XIV and that the protectorate in its existing form was of very recent origin.

The subsequent history of the protectorate in its administration and diplomatic ramifications does not concern us here. It flourished from 1860 to about 1888 and offered countless opportunities for increasing the prestige and power of France and Catholicism at the expense of the sovereign authority of Chinese rulers.⁷⁶ It must be said that China tolerated the French pretensions even if their legality was questionable.⁷⁷ Actually the protectorate did not suffer decline until (1) the guardianship of missions had become a secondary object of French policy in China; and (2) the unification of Italy

⁷¹ This is the opinion of the leading scholar on the modern foreign policy of the Vatican, Friedrich Ritter von Lama, in his book, *Papst und Kurie*, 492. Cf. also, a citation from the *Osservatore Romano* (Aug. 13, 1918), in *Papst u. Kurie*, 485.

⁷² Richter, *op. cit.*, 110.

⁷³ Soulié, *op. cit.*, 357.

⁷⁴ Cordier, *Relations*, I, 60-62. Portugal made no protest, and in her treaty negotiated a year later there is no mention of the protectorate; nor does any appear in the protocol over Macao in 1887. See Cordier, *Hist. Générale*, IV, 112, 166. There was probably some agreement whereby France should promote Belgian interests in China. See Callery, *Correspondance Diplomatique*, 108.

⁷⁵ Cited in Cordier, *Relations*, I, 66 ff.

⁷⁶ For opposing points of view on the workings of the protectorate, see Giquel, P., *La Politique Française en Chine depuis les Traités de 1858 et de 1860*, and Wolferstan, B., *The Catholic Church in China*.

⁷⁷ This is recognized by leading Chinese publicists. Wellington Koo, V. K., *The Status of Aliens in China*, 298.

and Germany had brought new sources of international rivalry in China, resulting in a joint *démarche* by the two at Paris in 1888, stating that henceforth they would protect their own missionaries.⁷⁸ Ironically enough, the spiritual mandate given France by the Papacy was issued in this same year,⁷⁹ and as late as 1903 an Italian Vicar Apostolic received his passports from Paris at the express command of the Vatican. In 1907 France finally gave official notice that she would henceforth act only in the interests of French missionaries, and the protectorate was ended.

⁷⁸ *Documents Diplomatiques Français*, 2 série, I, 8.

⁷⁹ This took the form of a declaration by the Propaganda, May 22, 1888. Ten years later, as the result of the German Emperor's voyage to Palestine, Leo XIII felt called upon to reaffirm this declaration. Cited in *Bulletin du Comité de l'Asie Française*, I, 119.

EDITORIAL COMMENT

THE ANNUAL MEETING OF THE SOCIETY

The Thirty-Fourth Annual Meeting of the American Society of International Law was held in Washington, May 13-15, 1940, in the lengthening shadows of the war which started in Europe on September 1, 1939. The Honorable Cordell Hull, Secretary of State of the United States, had been elected President of the Society at the annual meeting in April, 1939, and he delivered his inaugural presidential address at the opening of the thirty-fourth annual meeting on Monday evening, May 13, 1940. Because of the importance of the occasion, Mr. Hull's presidential address was broadcast over the radio to the nation and later to the world at large.

Mr. Hull stated the requirements of order under law in international relations to be scrupulous respect for the pledged word and the fulfillment of obligations, that each nation respect each other's independence, that disputes between nations be settled by none but pacific means and that treaties and agreements be revised by none but methods of peaceful adjustment, and finally, that trade and other economic relationships between nations be conducted upon principles of fair dealing and equal treatment. The terrifying developments of recent years in contravention of each of these essential conditions of an orderly world have brought upon the horizon, Mr. Hull said, the specter of a new descent into the conditions of international anarchy which characterized the Dark Ages. He urged united support of the American people behind the Government's efforts to exert the great weight of its moral influence in favor of the revindication and revitalization of order under law. Upon those who are devoted to the improvement and application of international law there devolves a special duty, he said, to make the significance of international law a living reality in the mind and heart of every American, and at the same time, of persistently searching for ways and means of strengthening the structure of international law and of making more effective the translation of its principles into firmly established international practice. He urged the Society to hold fast to the conviction that law and morality will triumph now just as they have in the past over the forces of lawlessness and chaos which have again risen to challenge the very concept of order under law.

At the conclusion of his address, Mr. Hull was presented by Dr. James Brown Scott, Honorary President of the Society, with an engraved reproduction of the famous Lincoln Cathedral copy of the Magna Charta, now in temporary custody of the Library of Congress in Washington. The presentation was accompanied with a note from Lord Lothian, the British Ambassador to the United States. In accepting the reproduction of the Magna Charta, Mr. Hull said that "this marvelous document of liberty is the

heritage of the entire human race. It is a challenge to oppression and tyranny everywhere, and the time could not be more appropriate for a fine reminder of its existence than at this time, when the world is being so hopelessly overrun by oppressors, by tyrants, by despots."

The evening's proceedings were concluded with an address by the Honorable Huston Thompson, former Chairman of the Federal Trade Commission, who proposed the establishment of an international trade tribunal as a means of promoting fair trade practices between nations.

The session on Tuesday morning, May 14, was a joint one with Section IX of the Eighth American Scientific Congress. It was presided over by Professor Jesse S. Reeves, a Vice-President of the Society, and Dr. José Matos, a delegate to the Scientific Congress from Guatemala. Appropriately, the session was devoted to international law in the Western Hemisphere. The first address was by Professor Charles E. Martin, of the University of Washington, who took as his subject "Regionalism and Neutrality as the Bases of Peace in the Americas." Predicating his remarks upon the conclusion that the problem of world peace has become over-rationalized and its machinery unwieldy, Professor Martin pointed out that the League of Nations had been unable to prescribe for the entire world by committing each state to an unlimited liability which might have become military, economic, or both. Professor Martin stated that peace in the Americas must be maintained through regionalism—greater and lesser—the former implying coöperation in the attainment and security of peace in the whole Western Hemisphere, and the latter implying coöperation among a small number of states for the adjustment and solution of the problems common to them. "The greater regionalism," Professor Martin said, "properly organized, must seek to maintain the neutrality of the nations of this hemisphere, through a deliberate policy of keeping out of European wars, and by maintaining neutral rights through collective arrangements, and, if need be, by collective action."

Mr. Lester H. Woolsey, Solicitor for the Department of State during the last World War, followed with a paper on "Problems of American Neutrality," which he devoted almost entirely to the Declaration of Panama, adopted by the American Republics on October 3, 1939, establishing a neutral maritime zone around the Americas, said to average three hundred miles wide, as a measure of continental self-protection. The declaration of such a zone, Mr. Woolsey said, is based upon the right of the American nations not only to remain aloof from European wars, but not to be endangered by belligerent activities. These attitudes, he said, are based upon the fundamentals of neutrality. Admitting that the three-mile limit seems firmly established as the marginal waters in which exclusive sovereignty may be exercised in time of peace as well as in time of war, Mr. Woolsey reviewed the efforts to extend jurisdiction beyond three miles. He referred especially to the growing practice of powerful belligerents of establishing war zones

upon the high seas, and he maintained that neutrals have as much right and national interest to establish barred zones of security and peace as have the belligerents to set up closed zones for defensive and offensive warfare. In view of the attitude of belligerents toward the Declaration of Panama, Mr. Woolsey thought its enforcement to be a serious matter. Belligerent policies are made effective by the use of force, but he saw no reason why neutrals should submit to a reign of lawless force, to the mob rule of belligerents, or be forced into a war which they do not want. His conclusion was that "safety for the neutral rests only in some union or league willing to use penalties or force to keep warring nations within bounds."

The general discussion which followed these two papers was led by President James P. Baxter, of Williams College, and Professor Francis Deák, of Columbia University Law School.

"Changing Concepts of International Law" was the general subject on the program for Tuesday afternoon, May 14. The session was presided over by President William C. Dennis, of Earlham College, a Vice-President of the Society. The first address was by Professor Joseph W. Bingham, of Stanford University Law School, on "Maritime Jurisdiction in Time of Peace." As an introduction to the consideration of this particular problem, Professor Bingham made some provocative philosophic observations on the nature of law from which he concluded that "law is not a product of impartial devotion to justice alone, but in large part is determined by very human and very selfish political and social influences." This is especially evident, he said, in the field of international relations. Then summarizing pertinent historical facts concerning maritime jurisdiction in time of peace, he denied that there ever has been common agreement over the width of the territorial marginal belt and over some of the incidents of jurisdiction of the coastal states within it and just beyond it. Notwithstanding what he termed the traditional Anglo-American doctrines which, he said, are opposed by the weight of expert opinion of the world, Professor Bingham maintained that the bitterest disagreements persist "over control of coastal fisheries, over the extent of customs supervision, over protective measures beyond the three-mile limit against breaches of the law of the coastal state, and, lately, over exploitation of oil resources beyond three miles off shore." He predicted that with or without the previous accord of those supporting the three-mile limit, the United States will take adequate measures to protect its coastal interests in such matters more than three miles from shore and will support other American states in the assertion of their similar jurisdictions.

Needless to say, Professor Bingham's theses did not go unchallenged. The attack upon them was led by Professor Philip C. Jessup, of Columbia University Law School, who was followed in the general discussion by Professor Athern P. Daggett, of Bowdoin College.

"Non-Recognition of Title by Conquest and Limitations on the Doctrine" was next on the program. The leading paper was read by Professor Herbert

W. Briggs, of Cornell University. Until recent times, Professor Briggs stated, recognition of title acquired by conquest was not considered essential to perfect title. He reviewed the inhibitions against conquest contained in general agreements such as the Covenant of the League of Nations, the Pact of Paris for the Renunciation of War, and the several inter-American conventions, as well as statements of the policy of non-recognition such as those made by Secretary of State Stimson, followed by the resolutions of the League of Nations. From this survey Professor Briggs concluded that although the legality of conquest is being seriously challenged, in view of the general acquiescence of states in recent conquests, it must be concluded that the old rule that conquest conveys valid title has not yet been superseded in the practice of states by a contrary rule. He thought that while the doctrine of non-recognition may give moral satisfaction to the non-recognizing states, yet moral censure has not been sufficient to cause a conqueror to disgorge. He concluded that the policy of non-recognition as practiced today is of slight value either as a sanction or as evidence that the rule that conquest confers valid title has been superseded. The general discussion which followed this paper was led by Professor Norman J. Padelford, of the Fletcher School of Law and Diplomacy.

The session on Tuesday evening, May 14, was conducted as a panel discussion of international law and organization, presided over by Senator Elbert D. Thomas, a Vice-President of the Society. There were four leading papers. Professor Percy E. Corbett, of McGill University, summarized conflicting theories of international law, especially the monist and dualist doctrines, and sought to implement Kelsen's theory with a sanction more rational than a metaphysical assumption. Professor J. Eugene Harley, of the University of Southern California, undertook to discuss the problematical subject of "Post-War International Organization." His address was written before Holland and Belgium were invaded and France had capitulated. "Trends in the Pacific Settlement of International Disputes" were discussed first in the matter of diplomatic procedure by Mr. H. Duncan Hall, formerly of the League of Nations Secretariat and recently visiting professor at Harvard University, and in the matter of judicial settlement by Mr. James O. Murdock, of the Bar of the District of Columbia. After the four principal papers had been delivered, the panel discussion was led by Mr. Willard B. Cowles, formerly with the General Claims Commission between Mexico and the United States, Mr. Henry S. Fraser, of the Bar of Syracuse, New York, Mr. Harold J. Tobin, of Dartmouth College, and Professor Francis O. Wilcox, of the University of Louisville.

The Thirty-Fourth Annual Meeting of the Society closed as usual with a banquet at the Carlton Hotel on Wednesday evening, May 15, which was attended by the President of the Society and about two hundred distinguished guests. Mr. Frederic R. Coudert, of New York, acted as Toastmaster, and the speakers were the Right Honorable Richard G. Casey, Australian Minis-

ter to the United States, Senator Elbert D. Thomas of Utah, and Dr. William Mather Lewis, President of Lafayette College.

An interesting sidelight of the meeting was a smoker tendered on the night of Monday, May 13, by His Excellency, Mr. John Pelenyi, Hungarian Minister at Washington, to the officers of the Society, the participants in its program, and a number of prominent officials of the Government and members of the diplomatic corps in Washington. On Wednesday, many of the members attended the luncheon of the Section of International and Comparative Law of the American Bar Association.

At the business meeting of the Society held on Wednesday morning, May 15, a revision of the Society's Constitution, prepared by the Committee on Organization appointed two years ago for that purpose, was adopted. The principal changes are in rearrangement of the provisions for purposes of clarity. The only substantial changes are elimination of the Executive Committee and a limitation upon the term of the President of the Society to three successive annual elections.

Mr. Hull was reelected President, Dr. Scott, Honorary President. The present Vice-Presidents, Honorary Vice-Presidents, Secretary and Treasurer were also reelected. The following members were elected to serve on the Executive Council until 1943: Elton Atwater, of New York; Percy E. Corbett, of Canada; Athern P. Daggett, of Maine; Charles Fairman, of California; Leland M. Goodrich, of Rhode Island; John Maktos, of Washington, D. C.; William R. Vallance, of Washington, D. C.; Sarah Wambaugh, of Massachusetts. Under the new Constitution, the Committee on Nominations is appointed a year in advance of the elections instead of at the current meeting. The following Committee on Nominations was elected to report to the next annual meeting: Green H. Hackworth, Philip C. Jessup, Norman J. Padelford, Graham Stuart, and Quincy Wright.

The printed *Proceedings* of the meeting containing the full text of all addresses and papers, and oral discussions at all sessions, including the annual banquet, as well as texts of committee reports, the minutes of the Executive Council, and an up-to-date list of the names and addresses of the members, will be ready for distribution within a few weeks. The subscription price is \$1.50 and should be sent to the undersigned.

GEORGE A. FINCH

Secretary

TIME AND INTERNATIONAL LAW

Lack of uniformity in reckoning time in early days was not a matter of much importance. Different methods developed in different regions. As the relations of men became closer, the need of uniformity became more evident, but religious and national usages were often opposed to uniformity, and as late as 1937 the League of Nations Committee on Communications postponed action on the much-discussed calendar reform.

Standard time was adopted in the United States within the memory of

many now living, and time zones were established by legislative act in 1918. The daylight-saving device was tried under a New York City ordinance of 1918 and has since spread to many of the cities and states of the United States and to Europe, Central and South America, and to Africa. The convenience of a generally accepted time standard brought about the agreement upon an international date line in the mid-Pacific Ocean at the International Meridian Conference in 1884 at Washington. The introduction of radio has made possible direct and instant communication between diplomatic agents and their foreign offices and also between the heads of states. The freedom of the press has assumed a different significance as radio propaganda disregards national boundaries, though wave lengths have been allocated among states by treaty. In the transportation of persons and goods as well as news in periods of peace, time has become a less important factor than formerly, and in the period of war modern methods of transportation have demanded new tactics and strategy.

Since 1907, treaty agreement has provided for "previous and explicit warning" before the commencement of hostilities, and this agreement was generally observed in the World War of 1914-1918. France informed other Powers that "a state of war exists between France and Germany dating from 6:45 p.m. on August 3, 1913." In early periods the war might be begun, continued and ended before its existence became generally known, even though the rights of third states might be gravely involved.

In the Treaty of Versailles signed June 28, 1919, Article 440 stated "For the determination of all periods of time provided for in the present treaty this date will be the date of the coming into force of the treaty." This was to be upon the deposit of ratification by Germany and three of the Principal Allied and Associated Powers, which was at 4:15 p.m. January 10, 1920. The Armistice had become operative at 11 a.m. November 11, 1918.

The Washington Treaty Limiting Naval Armament, February 6, 1922, in Article 19 provided "for the maintenance of the *status quo* at the time of the signing of the present treaty, with regard to the fortification and naval bases" in certain Pacific areas.

The Franco-German Armistice of June 23, 1940, was to "enter into force as soon as the French Government has concluded a similar agreement with the Italian Government.

"Cessation of hostilities will occur six hours after the Italian Government notify of its conclusion. The German Government will announce this by wireless." The order to "cease fire" was given at 12:35 a.m., French time, June 25, 1940.

GEORGE GRAFTON WILSON

GOVERNMENT TRAFFIC IN CONTRABAND

It appears from the press of the last few months¹ that pursuant to the policy of the United States Government to aid the cause of the allied belligerents, arrangements have been made whereby old stocks of arms, ammunition, machine guns and the like left over from the World War in the hands of the War Department have been turned back to manufacturers as credit on new and improved models, and that the manufacturers have sold them through the Allied Purchasing Agency to the British and French Governments. It is probable that several thousand rifles and hundreds of machine guns, field guns and mortars, together with ammunition, have been turned over to the Allies on this basis. In an opinion of the Acting Attorney General to the Secretary of War, dated June 3, 1940, he ruled that the War Department might, under the Act of July 11, 1919, sell or dispose of by exchange to private companies or individuals War Department supplies then owned, provided they are at any time declared to be surplus. He also held that under the Act of June 1, 1926, the Secretary of War was authorized to exchange "deteriorated and unserviceable ammunition and component parts thereof" for new materials of the same kind in condition for immediate use.

It further appears from press reports that similar trade-in arrangements have been made whereby the United States has turned back to manufacturers, subject to replacement by improved types, a large number of old Army and Navy bombing and other planes for sale to the belligerents. The United States has also postponed dates of delivery on orders for the later types of airplanes and airplane engines, which thereupon were sold by the manufacturers to the Allied Governments.² The United States agreed to accept later deliveries of improved models. It is reported that some of these were intended as reserves, but that the large orders of belligerents and the premiums paid by them for engines will increase production so that the need for reserves will be lessened. It is said that the President believes it is an advantage to the United States to have these planes tested in actual warfare. It is not clear from the various reports how many planes have been delivered in this way, but apparently several hundred have been released, and it is said perhaps two thousand or more planes will be ultimately turned over to the belligerents under this plan.

Under the early contracts, the planes were rolled across the Canadian border after title had passed and payment had been made pursuant to the Neutrality Act. But a recent ruling of the United States Government allows them to be flown over the boundary under contracts which automatically pass the title when the plane crosses the line. Formerly American pilots were not allowed to fly the planes to their destination in Canada, but

¹ Reports in the New York Times of March to June, 1940.

² In a similar way, it was reported, the Navy Department postponed deliveries of Brewster fighting planes of an "experimental type" and that the Brewster Company sold them to Finland for use in the undeclared Russo-Finnish War. (New York Times, Dec. 19, 1939.)

this restriction has now been modified by the Secretary of State under date of May 29, 1940, so that American pilots can fly them to destination in Canada.

After a bitter debate in the Senate over the Administration's aid-the-Allies policy, the Senate entered an amendment to the Navy expansion bill prohibiting any further disposal of Army and Navy material to the Allies unless the Chief of Staff or the Chief of Naval Operations certified it was "not essential to the defense of the United States."³ This may have the desired effect of retarding sales of war materials on hand or on order.

According to the press, negotiations have been under way for releasing to the British Government ten motor torpedo boats and ten submarine chasers out of the twenty-four ordered by the Navy Department from the Electric Boat Company of Bayonne, New Jersey, for experimental purposes. Two of each class were to be retained by the Navy for testing purposes. These boats were to be turned back to the company for sale to the British Government, the Navy taking deferred delivery of new and improved craft. It was stated that the projectiles for them would not be ready until fall and the delay in delivery would not exceed six months. Upon criticism of this deal in Congress, the Attorney General in an informal opinion ruled that such a sale was prohibited by a provision of the Act of June 15, 1917, whereupon the President called off the negotiations.⁴

An agreement between the United States and Great Britain for the exchange of cotton and rubber was signed on June 23, 1939. The ratifications were deposited in London on August 25, 1939, on which day the agreement went into force. It was proclaimed by the President September 6, 1939, after the outbreak of the present war.⁵ This agreement was still in process

³ Act of June 28, 1940, Pub. No. 671, 76th Cong., 3d Sess., Sec. 14(a), as follows: "Notwithstanding the provision of any other law, no military or naval weapon, ship, boat, aircraft, munitions, supplies, or equipment, to which the United States has title, in whole or in part, or which have been contracted for, shall hereafter be transferred, exchanged, sold, or otherwise disposed of in any manner whatsoever unless the Chief of Naval Operations in the case of naval material, and the Chief of Staff of the Army in the case of military material, shall first certify that such material is not essential to the defense of the United States."

Sec. 14(b) requires that a copy of each contract, order, or agreement covering such disposition where the cost exceeds \$2,000 shall be laid before Committees on Military and Naval Affairs of the Senate and House.

⁴ The provision of the Act of June 15, 1917, in question provides: "During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States." (U. S. Code, Title 18, Sec. 33.)

The violator "shall be fined not more than \$10,000 or imprisoned not more than five years, or both; and, in addition, such vessel, her tackle, apparel, furniture, equipment, and her cargo shall be forfeited to the United States." (*Id.*, Sec. 36.)

⁵ State Department press statement, Sept. 7, 1939; this JOURNAL, Supplement, p. 131.

of being liquidated in April according to a statement of Assistant Secretary of State, Mr. Grady, as reported in the press.⁶

These transactions relate to contraband of war and raise the question as to how far the United States Government as a neutral may go in dealing with belligerent governments in relation thereto. This is a question between neutral and belligerent governments, not between citizens of neutral and belligerent states or between citizens of neutral states and the government of a belligerent state, which is governed by different principles of international law.

The question here is not to be confused with the legality of traffic in contraband under municipal law. Municipal law on the subject may or may not coincide with international law, and it is international law and not municipal law which governs the obligations of a neutral state. The transactions under review are given a semblance of legality by virtue of opinions of the Attorney General and Acts of Congress cited above, but aside from this, the question remains as to whether these transactions violate the law and practice of nations.

None of these transactions appear to have been carried on directly between the United States and belligerent countries or their respective agencies. Yet it is clear that the purpose of the United States Government, as announced by the President on several occasions, was to give all possible aid to Great Britain and France in the present war, and these transactions appear to have been carried out in pursuance of that purpose,⁷ and as a result of negotiation and concerted action.

⁶ New York Times, April 28, 1940.

It is reported the Allied Governments sought to purchase from the United States the Government-owned machinery for the manufacture of smokeless powder, ammonia and ammunition. It is said the United States insisted on retaining the title to the machinery while making it available to private manufacturers in order to expedite production of these materials for this country as well as for the Allies. (New York Times, June 12, 1940.)

According to the press, the Chief of the United States Air Corps has been anxious to obtain Rolls-Royce engines which are the exclusive property of the British Government. The Secretary of the Treasury recently announced that with the assistance of Ambassador Kennedy he had obtained the license from the British Government to manufacture them in the United States. The British Government will apparently share in the production under the arrangement which was announced as an "intergovernmental transaction." The Secretary indicated that there would be Government loans to defense industries on an amortization basis. (New York Times, June 28, 1940.)

⁷ As early as May 16, 1940, in his message to Congress, the President said: "For the permanent record I ask the Congress not to take any action which would in any way hamper or delay the delivery of American-made planes to foreign nations which have ordered them or seek to purchase more planes. That from the point of view of our own national defense would be extremely shortsighted."

In his speech of June 10, 1940, at the University of Virginia he said: "We will extend to the opponents of force the material resources of this nation." It is clear in these speeches that the President was referring to the opponents of the Allied Governments.

In his cable of June 15, 1940, direct to Premier Reynaud, the President said: "The Government of the United States has made it possible for the Allied armies to obtain during the

Bynkershoek, who furnishes a convenient starting-point for his successors in the discussion of modern concepts of neutrality, says:

These [neutrals] must in every way guard against interfering in the war and against showing favoritism for or prejudice against either belligerent.

If I am a neutral I may not lend aid to one to an extent that brings injury to the other.

We shall not trade with either belligerent in the things by which war may be carried on against our friends. Accordingly it is unlawful to carry to either party the things he needs in actual warfare, as for instance, artillery, arms and, what he most needs, soldiers.⁸

Vattel, writing in 1758, says that neutrals are

not to give aid when not obliged to [by treaty]; not to furnish without obligation either troops, arms, ammunition, or anything which is of direct service for the war. I say not to give aid, I do not say to give it equally because it would be absurd for a state to aid two enemies at once. And more, it would be impossible to do so equally; the same things, the same number of troops, the same quantities of arms, of ammunition, &c. furnished in different circumstances are not equivalent aid.⁹

These principles of non-participation in a war and of abstinence from furnishing a belligerent with contraband have stood the test of two centuries and found the critical favor of jurists. John Bassett Moore states:

Nothing should be clearer than that a neutral government is bound to abstain from doing any act whatsoever that is in its nature unneutral. It seems obvious that a neutral government cannot itself sell arms to a belligerent without a flagrant violation of neutrality any more than it can itself supply money to a belligerent without a breach of neutral duty.¹⁰

weeks that have just passed airplanes, artillery and munitions of many kinds, and that this Government so long as the Allied Governments continue to resist, will redouble its efforts in this direction."

These declarations were hailed by the Allied Governments as assurances of aid and material support.

⁸ *Quaestionum Juris Publici*, I, 1, c. 9 (1737).

⁹ Vattel, *Le Droit des Gens*, L. 3, Sec. 104.

¹⁰ Moore, *Dig. Int. Law*, Vol. VII, p. 973. Moore cites as instances of unneutral conduct involving a government: a resolution of cadets of a French military school expressing sympathy with Spain in its war with the United States, the loan by the United States to the French Government in 1798, the sale by a neutral government of a man-of-war to a belligerent, the sale to Russia of certain German liners which were alleged to be subsidized by their government as practically to form a part of her naval reserve, a commercial agent of the United States offering to obtain a loan for Buenos Ayres in its war with Spain, assistance to holders of bonds issued by Chile and Peru in aid of a war with Spain. (*Id.*, p. 863 ff.)

Hyde, after citing these and other incidents, states that "the government of a neutral state is obliged to abstain from all participation in the conflict," which rule extends to "all

The rule has been crystallized in Hague Convention XIII of 1907, to which all of the great Powers except Great Britain and Italy are parties, which provides:

Article 6. The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power of warships, ammunition or war material of any kind whatever, is forbidden.

By a Joint Resolution of Congress of June 20, 1868, the Secretary of War was authorized to sell "the old cannon and other ordinance stores . . . damaged or otherwise unsuitable for the United States military service." Complaint was made that the sales under this Act during the Franco-Prussian War were in violation of neutrality. The Committee of Congress appointed to investigate the matter took the ground that, as the practice had begun before the war, the United States had the right to continue the same during the war. When it was suspected that the purchasing agents represented the French Government, the Secretary of War prohibited further sales, although the prior sales were consummated by delivery. This action was widely criticized, and recurrence was believed prohibited by Hague Convention XIII.¹¹

Without overlooking the effect of the increasing participation of governments in business and commerce through nationalization of industry or otherwise, the fundamental principle of neutrality, together with the meager precedents available, indicates that in the present state of the law a neutral government, its agencies and officers, must as a rule abstain from any act which amounts directly or indirectly to participation in commercial or financial intercourse with belligerents in aid of the war. This would seem to include the avoidance of such activities carried on by subterfuge, as by so-called private agencies in which the government has or exercises decisive control.¹² Clearly the sale of naval vessels, the barter of cotton surpluses in which the government has an interest, and the postponement of delivery of munitions on order for the government so that they may be sold to the belligerents, would seem to violate the principle. Trade-in arrangements, looked at from the view that the manufacturers are practically go-betweens of the belligerent and neutral governments, would also seem to violate the

persons in the public service of the neutral," including the civil and military branches, to "every possible field of activity" including the sale of war material, the loaning of money or the extension of credit, and to "placing its various agencies at the disposal of a belligerent in such a way as to aid it directly or indirectly in the prosecution of the war" including all vehicles of transportation, governmental industrial plants, channels of communication. (Hyde, *Int. Law*, II, p. 698.)

Among other authorities, see Wilson, *Int. Law*, 9th ed., p. 328; Cobbett, *Leading Cases on Int. Law*, 4th ed., II, p. 402; Oppenheim, *Int. Law*, 3d ed., II, p. 480; Wheaton, *Int. Law*, 1904 ed., p. 671.

¹¹ Oppenheim, *Int. Law*, 3d ed., II, p. 481; Scott, *The Hague Peace Conferences*, II, p. 628.

¹² See Lawrence Preuss, "The Effect of Governmental Control on Neutral Duties," *Proc. Amer. Soc. Int. Law*, 1937, p. 108.

rule—at least the spirit of the rule. At any rate, all of these activities come so close to the line as to be open to serious charges of unneutrality on the part of the United States in aiding and concerting with the belligerents in contraband trade.

In regard to the sale of vessels equipped for carrying on hostilities, the legal situation does not admit of much doubt. The principles go back to the three rules of the arbitration of the Alabama Claims against Great Britain (1871) in which the tribunal awarded the United States some \$15,500,000 damages against Great Britain on account of the depredations of the *Alabama* and certain other Confederate cruisers fitted out in British ports.¹³ These rules were to the effect that a neutral must use due diligence to prevent a belligerent from receiving an augmentation of naval strength within its territorial jurisdiction. These rules were substantially carried over into Hague Convention XIII of 1907¹⁴ and have long been a part of the neutrality laws of the United States, a violation of which is a crime punishable by fine or imprisonment, or both, and confiscation of the vessel involved. It is clear, therefore, that the sale of the torpedo boats would have been a serious violation of international law as well as the laws of the United States.

A somewhat similar incident occurred during the World War when a belligerent attempted to place contracts with an American concern for the construction and purchase of submarines. The project was abandoned at the suggestion of President Wilson.¹⁵

L. H. WOOLSEY

✓ CHANGING CONCEPTS OF INTERNATIONAL LAW

At a time when the whole system of international order and law is being undermined by the totalitarian philosophy, it is all the more imperative to reinforce the foundations of the law of nations. There must be no defeatism or compromise in the face of lawlessness. To make the law of nations a football of contending sides or subject to the gusts of "prevailing concepts of social expediency" is to reduce it to an ignominious rôle. This is not to ignore the fact that law must always be exposed to question and litigation, or to deny that changing conditions require changing conceptions of justice. This has been characteristic of the evolution of common law as well as of international law; but the function of the jurisconsult demands also profound respect for the sound doctrines underlying

¹³ Two cases of earlier indirect sales of warships are given by Oppenheim, *loc. cit.*, p. 481.

¹⁴ "Art. 8. A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which has been adapted entirely or partly within the said jurisdiction for use in war."

¹⁵ See this JOURNAL, Vol. 9 (1915), p. 177, for a learned discussion of the legal questions involved.

all law, irrespective of selfish opportunism and the passions of the moment. If changes in the application of these doctrines are imperative, he must know how to effect them logically and equitably without injury to the doctrine itself. The doctrine or principle involved should never be discarded merely because Russia, Germany, or the United States, for reasons of national interest, should demand that it be distorted, sabotaged, or thrown overboard.

It is trite to observe that all values are being challenged and that an immense confusion of thought prevails in almost every field of human interest. We are compelled to reexamine the foundations of accepted principles and institutions. The value of law as a natural growth over the centuries would seem to have been greatly minimized, as though the exigencies of diplomacy or the passions of the hour compelled the tribunals of justice to abdicate their sacred functions. Such undoubtedly has been the alarming trend of late in domestic and international affairs. Impatience with the administration of law has led often to direct control over the courts by various political devices. In international affairs we are witnessing the portentous spectacle of the arrogance of totalitarian doctrines in antagonism to the whole system of international order and law. The claims of contending nations too often have been based on force rather than on right. Principles of justice have been subordinated to expediency. International agreements frequently have created new rules though they have not created new law.

What is needed today is a reaffirmation of the basic principles on which international law has been founded rather than a yielding to the exigencies of changing concepts of an opportunistic nature. We must emphasize the origins of the principles of international law and let its adaptations take care of themselves. (We should return to the concept of the logical growth of law as something that emerges *ex necessitate juris* out of what has quaintly been termed "the reason of the thing.") We might even with profit listen to the dictates of natural law as being an appeal much saner and safer than to the uncertain and unenlightened opinions of a bemused electorate. The basic principles of law are not determined by shifting legislation or even by treaties. They have been laboriously evolved out of human experience and proclaimed by the jurists. There are sound doctrines of property, of contract, of human relationships and of international interests. They may have been adapted to changing conditions but they need never be subjected to vagaries of popular demands and the dictates of expediency.

The view of law here presented may perhaps be best illustrated by the question of jurisdiction over coastal waters. The so-called "three-mile limit" of jurisdiction did not originate as an arbitrary limit of sovereign jurisdiction. On the contrary, it was merely the temporary application of a sound principle, namely, that of the fundamental, inalienable right of a nation to extend its jurisdiction "as far as its arm might reach" from shore. At the time Bynkershoek enunciated this doctrine the limit of a cannon shot was about three miles. Since that time various nations with diverse geographical

conditions and interests have laid claim to widely different limits of jurisdiction. A right of "protective jurisdiction" varying with changing circumstances has emerged and received general recognition. This right may be contested by rival interests, but it should not be disposed of by diplomatic compromises or by any prevalent notions of expediency. It should be determined impartially by appeal to the rational principle involved. Its adaptability to changing conditions is quite another matter.

It is clear that civilization is going through a cataclysmic crisis and that international law must undergo revolutionary changes. Nevertheless, whatever sound principles inhere in the system of the law of nations must be resolutely proclaimed and maintained. It still has a sacred function to perform. Progress cannot wisely be made *per saltum*. We move from one foundation stone to another. Certainty should be the rule and not speculation or accommodation. We must not lose faith in a justice which is protected from intimidations by gangster nations or from the clamorous demands of expediency. Those who serve as priests in the temple of international justice have a solemn responsibility to guard against the specious arguments of theorists or politicians which would deflect justice from its loyalty to sound principles and eternal values.

PHILIP MARSHALL BROWN



IN SUPPORT OF INTERNATIONAL LAW

In such days as these, the reiteration of the international lawyers' faith in international law is unfortunately not superfluous. One is struck by the fact that the uninformed lay opinion which denies the existence of international law is frequently supported by international lawyers themselves. In this respect, there is a curious reversal of what is assumed to be the normal situation: the professors despondently invoke realism, while government officials steadfastly continue to heed what recreant academicians consider no more than an idealistic hope or an historical relic. This statement is not to be read as indicating avoidance of the fact that international law is being breached daily by government agents or under government direction. The point is that these breaches are not novelties, even though in degree they may exceed past violations of the law. It still remains true that in a large part of the world the routine of international life is governed by international law. Throughout the twenty-one American Republics, the daily conduct of individuals in many walks of life is governed by laws and regulations issued as a result of their governments' regard for the law of neutrality. When the manager of a theater in Buenos Aires displays a newsreel of the war, he must first display a notice warning the public not to make a demonstration for or against either belligerent side; this is inspired by the Argentine Government's neutrality.¹ When the branch manager of a French firm wishes to

¹ Ordinance of the City of Buenos Aires Relative to Public Discussions in Favor of or Against any Belligerent, Oct. 24, 1939. Deák and Jessup, *A Collection of Neutrality Laws, Regulations and Treaties*, Supplement (1940), p. 32 [21].

cable to Marseille from Stockholm, his use of his usual business code is impossible because the use of code or cipher in private telegrams is forbidden.² The *Graf Spee* would now be in service or would have been destroyed or captured in battle instead of suffering its ignominious fate, if the Government of Uruguay had not applied to its sojourn and repair the rules of international law and if the British naval vessels had not respected the inviolability of neutral waters. If international law were non-existent, the German merchantman *Columbus*, riding outside the breakwater at Vera Cruz, would have been captured by the British as readily as the *Dusseldorf*, which was found on the high seas. Were it not that some dozens of mercantile states have adopted—for purposes of the law of neutrality—a certain test of “defensive armament” on merchant vessels, would not British merchantmen be already in a position to act more effectively as naval auxiliaries by having guns mounted both fore and aft and amidships as well? Why did German merchantmen at the outset of the war freely fuel in various American ports while German warships were strictly limited in the supplies they might take? Feelings may be aroused by campaigns for aiding sufferers in England and France as much as by actual recruiting for military service, but the United States permits the former and not the latter because, as these lines are written, respect is still paid here to the rules of international law.

One ought to feel under an obligation to apologize for referring to such elementary aspects of the international legal system in a comment in this JOURNAL; unfortunately the apology is not due under conditions which obtain at the time of this writing. The bitter disillusionment of today is the result of exaggerated hope, not of the ultimate collapse of human civilization. Those who were so sure that the Covenant of the League of Nations and the Paris Pact had ushered in a new era and who therefore scorned much of the law built up painfully through the centuries must bear a share of responsibility for the feeling of hopelessness which is today so prevalent.

The danger lies not merely in the despondency of the moment but in the undermining of those foundations upon which the United States and like-minded nations must rebuild the world after the present horror ends, as some day it will end. Of what use are the numerous researches now being carried on in this country relative to the post-war adjustments, if an underlying confidence in international law is meanwhile destroyed by the very groups who should be its main supporters? International lawyers are under an obligation to their profession to keep asking the simple questions which one might put to a beginners' class: Is there to be no more extradition of criminals, say, between Cuba and the United States? Are the foreign ambassadors in Washington to be hailed into court as defendants in petty lawsuits? Should the United States relieve Mexico from her continuing obligation to pay by installments the claims of the United States under the agreements of

² Notification to the Bureau of the International Telecommunications Union, No. 346, p. 4. *Ibid.*, p. 988 [4], Editors' Note.

April 24, 1934, and November 9/12, 1938, upon the theory that the obligation flows from an international law which is non-existent? Should the Federal courts now considering the appeal in the case of the Spanish silver³ brush aside the arguments of counsel which are based on international law, on the ground that a non-existent thing cannot now be considered part of the law of the land?

Such incidents of the international legal system are so obvious that they are forgotten in the mental stress of considering (such violent breaches of the laws of war and of neutrality as are daily reported in the press.) Emotional reactions tend to support the devastating theory that the United States also should cast aside all respect for law. It is comforting to find the opposite thesis stoutly maintained in at least one editorial column.⁴

The Allies have had to encounter acts of aggression without pretext, open violation of all treaties, unprovoked declarations of war; in a word, whatever corruption, intrigue, or violence could affect for the purpose, openly avowed, of subverting all the institutions of society. . . . This state of things cannot exist . . . without involving all the surrounding powers in one common danger; without giving them the right —without imposing upon them the duty, to stop the progress of an evil which exists only by the successive violation of all law and property, and attacks the fundamental principle by which mankind is united in the bonds of civil society.

So reads the Declaration of the British Government to the commanders of the forces by sea and land, October 29, 1793.⁵ Yet 1815 saw the meeting of a great law-making conference and the beginning of a period of rapid development in international law. Like statements were made between 1914 and 1918, but international law continued its progress after 1919. I am not concerned here with undercurrents of policy, with the military or diplomatic steps which the United States should take to assure that in 1941 or 1945 or 1950 international law shall have "a new birth of freedom," save to suggest that such a day will not be hastened by an abandonment of law. There are institutions as well as principles which need to be saved. The Permanent Court of International Justice can be helped to justify its name by an offer of hospitable asylum in the United States, and weak indeed would be the voices which would seek to persuade the people today that this would be a move to drag us into the League of Nations through the back door. There is also the International Labor Organization of which the United States is a part and which might also find temporary refuge on these shores. If our preparedness is to be against the future as well as the present, part of the cost might well include voluntary financial support for such organs as these and other technical international services which cannot now function in Europe.

While events move with such alarming speed, it may be considered futile

³ *Banco de España v. Federal Reserve Bank of New York et al.*, 28 F. Supp. 958 (1939).

⁴ Editorial in the *Hartford Courant*, May 25, 1940.

⁵ *Neutrality, Its History, Economics and Law*, Vol. II: Phillips and Reede, The Napoleonic Period, pp. 7-8.

to write such statements as these several weeks in advance of their publication. The alternative is to embrace the counsel of despair which would be a recreant rôle for the profession of international law.)

PHILIP C. JESSUP

GOVERNMENT CONSENT TO PUBLICATION OF DIPLOMATIC CORRESPONDENCE

The usage whereby one government publishes a diplomatic communication from another government only with the latter's consent has recently occasioned discussion.¹ Publication by the United States, in the *Foreign Relations* series, of the Paris Peace Conference records with the Minutes of the Council of Four, was delayed because of reported difficulty in securing the consent of all the states concerned.² Before the appearance in English of these documents, which will presumably illuminate still further the factors entering into the last peace after a world war, another major European conflict has developed with the result of making records of the Paris Conference no less important but of more purely historic interest.

There is no novelty in the idea that inter-governmental communications should be kept highly confidential for a reasonable time, perhaps indefinitely. There has always been some "secret" diplomacy, and even with the very great amount of democratic control of foreign policy in certain countries, many important matters will doubtless continue to be handled without publicity. There appears to be no rule of international law prescribing secrecy as a duty of the state receiving a communication, and it remains a matter of good faith and comity, in line with the assumption of mutual respect and regard for the sensibilities of other states. In the case of the United States, the country has sometimes adhered rigidly to the requirement of consent as a condition precedent of publication, and at other times has taken a position opposing the principle. An example of each attitude will illustrate.

During the period of the negotiations immediately preceding the Alabama Claims settlement, when Mr. Fish was Secretary of State and General Schenck American Minister to Great Britain, there was apprehension lest public feeling should be aroused, particularly in connection with the "indirect" claims brought by the United States against Great Britain. Under this situation, Sir Edward Thornton, British Minister to the United States, reported to Earl Granville, in a communication received May 26, 1872, as follows:

I have the honor to inform your Lordship that, during a conversation which I had late last night with Mr. Fish, he said that the public

¹ See, for example, the report of the Committee on Publications, Proceedings of the Sixth Conference of Teachers of International Law and Related Subjects (1938), p. 9.

² Report of Committee on Publications of the Department of State, Proc. Amer. Soc. Int. Law, 1938, p. 225; *ibid.*, 1939, pp. 225-226. See also the statement by Professor Herbert Wright, *ibid.*, 1938, p. 172, concerning the publication in Italian of a verbatim report of the proceedings of the Council of Four.

was extremely anxious and intensely curious as to what had lately passed between the two Governments on the subject of the indirect claims, and that he thought it would be admirable to take some measure to allay this impatience. He suggested that it would be well either to send to Congress in open session, or to publish, the four notes which passed between your Lordship and General Schenck on the subject of claims for indirect damages, two telegrams relative to the presentation of the British Counter Case, and a dispatch from General Schenck to Mr. Fish, which the latter read to me. To the publication of the three latter there did not seem to be the slightest objection, nor, as I thought, to that of the four notes. But Mr. Fish did not seem satisfied with my opinion, and said that, as he did not wish to do anything which might at all embarrass Her Majesty's Government, he would rather that I would telegraph your Lordship upon the subject, in the hope that you would give assent to the publication of the above-mentioned documents.³

Even after some of the papers had actually appeared in print, the American Secretary of State did not feel free officially to publish the papers without British consent. In a note received two days after that quoted above, Sir Edward Thornton wrote concerning President Grant's message to the Senate in secret session and documents accompanying the message, that "it is supposed that copies of these documents must, by some surreptitious means, have been abstracted from the Senate," since they had been published in a New York newspaper. But Mr. Fish was still unwilling to relieve the Senate of the injunction of secrecy with respect to the documents so that they might become "officially public," if Sir Edward Thornton thought that Her Majesty's Government would object to it. Sir Edward could see no objection.⁴

An incident illustrating the opposite attitude occurred eleven years later, when the following instruction was sent from Mr. Secretary Frelinghuysen to Philip H. Morgan, American Minister to Mexico, under date of August 28, 1883:

Your No. 668 of the 17th ultimo presents the question which has been raised in the Diplomatic Body in Mexico, by the representative of Spain, whether the publication by the Mexican Government of correspondence initiated by a foreign Minister, without previously consulting such Minister as to the propriety of such publication, is a breach of diplomatic etiquette, requiring the remonstrance of the Diplomatic Body.

Your attendance at a meeting of the Body having been solicited, and your views on the subject asked by your colleagues, you very properly declined to attend, and it does not appear that the suggested meeting has been actually held. In the absence of any express reserve or pledge

³ Parl. Papers, "North America," No. 9 (1872), p. 19.

⁴ *Ibid.*, p. 20. Publication several years ago by the Peruvian Government of documents less than two years old caused "appropriate diplomatic representations" to be made by the Ambassador of the United States. Report of Committee on Publications of the Department of State, Proc. Amer. Soc. Int. Law, 1937, pp. 239-249; Hearings of the Subcommittee of the Committee on Appropriations, House of Representatives, 75th Cong., 3d Sess., on Department of State Appropriation Bill for 1939, p. 104.

of confidence asked and given, correspondence between governments is the property of either, to be published if the interest of either require.

This Government in common with most other governments publishes so much of its diplomatic correspondence from time to time as is considered to be required for the information of the national legislature and the people.

It is thought quite immaterial on which side the correspondence may have been initiated, questions of public utility alone being sufficient to decide the time and the extent of publicity to be given to it.

It is thought that Señor Crespo's own government follows in principle the same general rule. The Spanish Blue Books for several years past contain examples of correspondence initiated by the representative of this country at Madrid, and published by the Spanish Government without consultation with him.

Supposing that the incident you report had occurred to you, instead of the Spanish representative and that the Mexican Government had published a letter of inquiry from you and its reply, this Government would not have found in such proceeding any departure from what it thinks proper, unless, indeed, some fact should be adduced which might tend to make the publication an intentionally discourteous act.

The propriety, however, of diplomatic representatives, without instructions from their respective Governments meeting to condemn the action of the Government to which they are accredited, whether it be on a matter of etiquette or policy, is at least very questionable. . . .⁵

The present rule of the Department of State can be seen from a Departmental Order of 1925⁶ setting forth principles to guide the editing of *Foreign Relations*. These principles recognize, *inter alia*, as "legitimate and necessary" omissions, those made "to preserve the confidence reposed in the Department by other governments. . . ." The rule of consent as a prerequisite is impliedly accepted in the statement that "when a foreign government, in giving permission to use a communication, requests the deletion of any part of it, it is usually preferable to publish the document in part rather than to omit it entirely." A still clearer announcement of policy appears in the following part of the same Departmental Order:

The Chief of the Division of Publications is expected to initiate, through the appropriate channels, the correspondence necessary to secure from a foreign government permission to publish any document received from it and which it is desired to publish as a part of the diplomatic correspondence of the United States. Without such permission, the document in question must not be used. . . .

The United States of course does not have to await consent of any other party in order to publish its own communications to foreign governments. They are now frequently published in the *Bulletin of the Department of State*.⁷ But it is difficult for individuals outside of the Foreign Office to make

⁵ MS. Instructions, Mexico, Vol. 20, p. 656. This instruction is referred to, but not quoted, in J. B. Moore, Digest, IV, p. 722.

⁶ For. Rel., 1914, Supp., pp. iii-iv (published in 1928).

⁷ See, for example, the summary of the statement made by the American Government to

adequate analyses without also having texts of the replies. There is high authority for the statement that requirement of the foreign government's consent as a condition precedent to publication by the United States came into use only during the quarter-century before 1937.⁸

The possible desirability of holding in confidence communications of foreign governments during the actual pendency of questions dealt with in the correspondence is apparent. A similar policy might be necessary with respect to much diplomatic correspondence in time of war or other crisis. A breach of the confidence clearly reposed by a foreign government would not ordinarily be defensible. Retroactive application of a new policy in the subject-matter would probably be inadvisable. A question may be raised, however, as to the justification, in a democracy, of proceeding upon the assumption that every communication from a foreign government must always be withheld from publication without prior consent of the sending Foreign Office. It would seem possible, in ordinary peacetime at least, to follow a somewhat more open, and less conservative policy, without danger to the public interest.

ROBERT R. WILSON

the Japanese Government in connection with the Alaska salmon fishery situation, U. S. Dept. of State Press Releases, March 26, 1938, pp. 413-417.

⁸ John Bassett Moore, "The Dictatorial Drift," *Virginia Law Review*, Vol. 23 (1937), pp. 863, 865.

CURRENT NOTES

THE ANALYTICAL INDEX

The second analytical index to the *AMERICAN JOURNAL OF INTERNATIONAL LAW* and Supplements, including the Proceedings of the American Society of International Law, which has been in preparation for several years, is expected to be ready in the fall. This second index covers all the publications of the Society since the first analytical index was issued. The first index, it will be recalled, covered the Society's publications from the beginning in 1907 up to and including the year 1920. The second index will cover the Society's publications beginning with the year 1921 up to and including the year 1939, that is to say, 19 volumes of the *JOURNAL*; 19 volumes of the regular Supplements, 3 volumes of Special Supplements, and 19 volumes of Proceedings published during that period, or 60 volumes in all.

In arrangement, the second index will be the same as the first. All entries for authors, subjects, documents, cases and cross-references will be listed in a single alphabet. The index entries will indicate the volume and page number of the *JOURNAL*, Supplement, or Proceedings, as the case may be. The work of the Harvard Research in International Law, published in three different phases in the Supplements to the *JOURNAL*, is, of course, included in the index.

In the announcement which the late Elihu Root, then President of the Society, made in regard to the first index, he called attention to the fact that the *AMERICAN JOURNAL OF INTERNATIONAL LAW* happened to start in 1907, the year following the publication of Moore's *Digest of International Law*, and he thought the Society's *JOURNAL* might be considered as a continuation of the history and progress of international law from Moore's *Digest*. Without making any undue claim as to the value of the second index, it might be pointed out that it covers an era in international law and relations probably without parallel in their development and of unequalled importance in the world's history.

It happens that the second index makes accessible the contents of the Society's publications issued soon after the end of the World War and the going into effect of the Treaties of Peace of 1919 and 1920. The index concludes with the Society's publications issued at what seems to be the end of that epoch by the outbreak of the present war. No international incident of any consequence and no question of international law worthy of mention which occurred during that interval is omitted from the critical notice of the Society's publications. Practically all the questions of a legal character which arose in connection with the organization and activities of the League of Nations and the Permanent Court of International Justice are also covered.

The preparation and publication of the second index entails very great expense and for that reason it has been decided, as was the case with the first index, to place its distribution upon a subscription basis. It will be sold for the nominal price of \$5.00. Subscriptions may be sent to the Society.

GEORGE A. FINCH
Secretary

JAMES WILFORD GARNER MEMORIAL STUDENT LOAN FUND

Moved by a desire to establish at the University of Illinois a suitable memorial to the late Professor James W. Garner, of beloved memory and for many years an editor of the JOURNAL, a number of his former students and colleagues have undertaken the task of raising a sum of money which is to be turned over to the University and which is to bear the title "James Wilford Garner Memorial Student Loan Fund." The principal and income of the fund will be used to make loans to worthy students who are upper classmen majoring in political science at the University. The committee of sponsors, of which Dr. David Kinley, President Emeritus of the University of Illinois, Wallace R. Deuel, Berlin correspondent of the *Chicago Daily News*, and Irving Dilliard, editorial writer of the *Saint Louis Post-Dispatch*, are honorary chairman, chairman and acting chairman respectively, has addressed letters to three thousand former students of Professor Garner inviting them to contribute to the fund. Contributions from any other persons desiring to participate in this effort to do honor to Professor Garner's memory would, of course, be welcome and appreciated. Checks should be made payable to the fund and addressed to Valentine Jobst III, Treasurer, 301 Lincoln Hall, Urbana, Illinois.

EIGHTH AMERICAN SCIENTIFIC CONGRESS

As a by-product, so to speak, of the International Conferences of American States of a general character, a great many inter-American congresses devoted to special fields of science or other activities have been held. Included is the series of Scientific Congresses of the Western Hemisphere, the first of which took place at Buenos Aires in 1898 on the occasion of the celebration of the Silver Jubilee of the Argentine Scientific Society. This congress was designated as the "First Latin-American Scientific Congress." The Second Latin-American Scientific Congress was held at Montevideo, Uruguay, in 1901, and the third at Rio de Janeiro in 1905. At the last mentioned, it was decided that the agenda for the next congress, to be held in Santiago, Chile, should be broadened in scope to include matters of an inter-American nature. The congress was held in Chile in 1908 and was designated as the First Pan American Scientific Congress. The Second Pan American Scientific Congress was held at Washington in 1915, and the third at Lima, Peru, in 1924. At the Lima Congress it was decided that the next in the series should take cognizance of the fact that it would be the

seventh of the international American assemblies inaugurated at Buenos Aires in 1898. The congress held in San José, Costa Rica, in 1929 was therefore known as the Seventh American Scientific Congress. The eighth has just been held in Washington.

By a singular coincidence, the Eighth American Scientific Congress, held in Washington in 1940 in celebration of the fiftieth anniversary of the founding of the Pan American Union, was obliged to convene while the world is engaged in a major armed conflict, just as the Second Congress, held in Washington in 1915 in celebration of the twenty-fifth anniversary of the Pan American Union, convened during the last World War. While the Eastern Hemisphere uses the achievements of science for purposes of horror and destruction, the American Republics once again have given the world an example of uninterrupted scientific activity in an atmosphere of peace and collaboration.

The American Scientific Congresses are divided into a number of sections, each devoted to a particular field of scientific thought and achievement. As in previous congresses, one of the sections at the eighth was devoted to International Law, Public Law, and Jurisprudence. Dr. James Brown Scott, Honorary President of the American Society of International Law, and formerly Editor-in-Chief of the *JOURNAL*, was the chairman of this section. The annual meeting of the American Society of International Law was postponed from the last week in April so as to meet with this section. Similar action was taken by the American Law Institute and by the Section of International and Comparative Law of the American Bar Association. Some members of these associations and delegates to the Scientific Congress interchanged visits to their respective meetings.

The Scientific Congress was formally inaugurated at Constitution Hall by the President of the United States on the evening of Friday, May 10. The first plenary session was held on Monday, May 13, at which the address of welcome was delivered by the Secretary of State. It closed on Friday afternoon, May 17, in the Pan American Building, with a farewell address by the Honorable Sumner Welles, Chairman of the United States Delegation and President of the Congress. Secretary of State and Mrs. Hull tendered the delegates an official reception on Saturday evening, May 11. Sight-seeing trips in and near Washington preceded the Congress and took place afterwards, including a visit to the New York World's Fair.

The meetings of Section IX began promptly on the first day of the Congress, May 10, and were held daily until the closing session on Friday, May 17. The papers and discussions were grouped under International Law, Private Law and Private International Law, and Public Law and Jurisprudence.

Under the general heading of International Law, the following papers were read: natural law and public international law, by Héctor David Castro, of El Salvador; conflicting theories of international law, by Jesse S. Reeves, of the University of Michigan; the law of nations and the future



international order, by Alejandro Alvarez, of Chile; inter-American organization, by Gustavo Gutiérrez Sánchez, of Cuba, and Edgar Turlington, of Washington, D. C.; inter-American economic solidarity, by Dantès Bellegarde, of Haiti; diplomatic protection of foreign financial interests, by Ramón Beteta, of Mexico; relation between international law and national law, by Alberto Cruchaga Ossa, of Chile, and Edwin Borchard, of Yale University; diplomacy and treaty revision, by Graham Stuart, of Stanford University; arbitration, by Julián R. Cáceres, of Honduras, and Frances Kellor, of New York.

The subjects discussed at the joint session of Section IX with the American Society of International Law have been summarized above.¹

Under the heading, Private Law and Private International Law, Alberto Ulloa, of Peru, discussed the codification and unification of law in America; William Draper Lewis, Director of the American Law Institute, and César Salaya, of Cuba, recommended the comparative study of the Bustamante Code and the American Law Institute's Restatement of the Law of Conflict of Laws; Arthur K. Kuhn, of New York, compared the scope of the term "Private International Law" in Latin America and the United States; Horacio F. Alfaro, of Panama, delivered a paper on private trusts, family rights and inheritances in Latin American countries and the United States; and Ernest G. Lorenzen, of Yale University, advocated uniformity in the rules relating to commercial contracts.

Under the heading, Public Law and Jurisprudence, there were discussed the organization of an Inter-American Bar Association, by J. Blanco Uztáriz, of Venezuela, and of an Inter-American Institute of Comparative Law, by Pedro G. de Medina y Sobrado, of Cuba, and William C. Rigby, of the United States. José Agustín Martínez, of Cuba, delivered a paper on uniformity in jurisprudence and legislation, and John T. Vance, Law Librarian of the Library of Congress, considered the possibilities of uniformity. Natalio Chediak, of Cuba, treated of unification of the law of copyrights. The influence of Roman law on jurisprudence was considered from the point of view of Latin America by José Matos, of Guatemala, and of the United States of America, by H. Milton Colvin, of Washington, D. C. The fundamental elements of constitutional law in the Americas was the subject of papers by Juan Clemente Zamora, of Cuba, and Edwin S. Corwin, of Princeton University. Walter L. Moll, of George Washington University, read a paper on the functions of law; Pablo J. Lavín, of the University of Habana, spoke on law and ethics; and Walter B. Kennedy, of Fordham University, on new schools of juristic thought.

In addition to the foregoing papers which were actually read at the Congress, a large number of others were submitted by authors who were not present and these were listed in the program and read by title.

The Proceedings of the Scientific Congress are now being prepared for

¹P. 492.

publication under the supervision of the Department of State. A complete transcript of all the oral discussions was kept in Section IX and will be included in the Proceedings along with the principal prepared papers. Those interested in obtaining the printed Proceedings should communicate with the Department of State at Washington.

GEORGE A. FINCH
Secretary

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 18-MAY 15, 1940

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *R. A. I.*, Revue aéronautique internationale; *U. S. T. S.*, U. S. Treaty Series.

October, 1939

- 8 FRANCE—GREAT BRITAIN. Exchanged notes at Paris respecting the abolition of consular visas on bills of health. Text: *G. B. T. S.*, No. 9 (1940), *Cmd.* 6187.

November, 1939

- 24-January 18, 1940 FRANCE—GREAT BRITAIN. Exchanged notes at London on Nov. 24, Dec. 5, and 8, 1939 and Jan. 18, 1940, modifying the protocol respecting the New Hebrides. Texts: *G. B. T. S.*, No. 8 (1940), *Cmd.* 6184.

January, 1940

- 24 GERMANY—LITHUANIA. Signed agreement for the transit of goods through Lithuania, between Germany, Russia and Manchukuo. *B. I. N.*, Feb. 10, 1940, p. 194.
- 30/February 28 NEW ZEALAND—UNITED STATES. Agreement reached by exchange of notes at Wellington relating to the importation into New Zealand of aircraft and aircraft components manufactured in the United States. The arrangement became effective Mar. 1, 1940. *D. S. B.*, Apr. 20, 1940, p. 424.

February, 1940

- 1 URUGUAYAN BLUE BOOK. The government issued a blue book regarding the *Graf Spee* incident. *B. I. N.*, Feb. 10, 1940, p. 201.
- 13 GERMANY—LATVIA. Germany ratified an agreement concerning the disposition of goods left by German nationals in Latvia who had returned to the Reich. *N. Y. Times*, Feb. 14, 1940, p. 5.
- 14-March 27 ALTMARK (Steamship) The *Altmark* (German) was stopped Feb. 14 in Norwegian territorial waters for search. Summary of Norwegian Foreign Minister's report to the Storting: *London Times*, Feb. 29, 1940, p. 8. On Feb. 16 the British cruiser *Cossack's* crew boarded the *Altmark* in Norwegian waters and released 326 British prisoners. *N. Y. Times*, Feb. 18, 20, 1940, pp. 1, 38 and 4. Norway and Germany protested. *London Times*, Feb. 19, 1940, p. 6; *N. Y. Times*, Feb. 19, 1940, pp. 1, 5. Text of Norwegian Admiralty report of Feb. 17: *London Times*, Feb. 19, 1940, p. 8. The Norwegian Senate's court of inquiry opened hearings Feb. 23 at Hornshauge and Egersund to establish the facts. *N. Y. Times*, Feb. 24, 1940, p. 2. On Feb. 27 the British Foreign Office considered the Norwegian suggestion to submit the case to an international tribunal. *N. Y. Times*, Feb. 27, 1940, p. 2. The ship arrived at Kiel on March 27. *London Times*, Mar. 28, 1940, p. 7. Summary: *B. I. N.*, Feb. 24 and March 9, 1940, pp. 225-231, 291-293.

- 16 CZECHOSLOVAK RECOGNITION. The Union of South Africa recognized the Czechoslovak National Committee. *B. I. N.*, Feb. 24, 1940, p. 262.
- 16/March 30 FRANCE—GREAT BRITAIN. Signed commercial agreement at London on Feb. 15 and a protocol in Paris, March 30. *N. Y. Times*, Feb. 17, 1940, p. 3; *B. I. N.*, Apr. 6, 1940, p. 434.
- 17 EUROPEAN COMMISSION OF THE DANUBE. The Commission opened meetings at Bucharest to discuss issues arising from the war. *N. Y. Times*, Feb. 18, 1940, p. 25.
- 20 DANUBE SHIPPING CONFERENCE. German, Slovak, Hungarian, Rumanian and Yugoslav delegations attended a conference at Budapest. *N. Y. Times*, Feb. 22, 1940, p. 6.
- 20 GUATEMALA—UNITED STATES. Signed extradition treaty at Guatemala City, supplementing that of Feb. 27, 1903. *N. Y. Times*, Feb. 25, 1940, p. 27; *D. S. B.*, Feb. 24, 1940, p. 220.
- 21 REFUGEES. The Dominican Senate and Chamber of Deputies ratified the contract, signed Jan. 30 last, for the immediate settlement of 500 European families. *N. Y. Times*, Feb. 22, 1940, p. 10.
- 22 BLOCKADE. A British note rejected the United States' protest of December 7 last against the British seizure of German exports. *N. Y. Times*, Feb. 23, 1940, pp. 1, 10.
- 23 CHINESE SILVER. Announcement made that the Chinese Government has rejected the British plan to settle the Anglo-Japanese-Chinese dispute over \$3,200,000 worth of Chinese silver by storing it in a neutral bank until the war's end. *N. Y. Times*, Feb. 24, 1940, p. 6.
- 23 FRANCE—HUNGARY. Signed trade treaty at Paris, effective March 1, 1940. *N. Y. Times*, Feb. 24, 1940, p. 4.
- 23 GERMANY—NORWAY. Trade agreement signed at Oslo. *N. Y. Times*, Feb. 24, 1940, p. 2.
- 23-March 25 PANAMA DECLARATION. Texts published of British, French and German replies to the protest of the 21 American Republics on their violation of the neutrality zone. *D. S. B.*, Feb. 24, 1940, pp. 199-205. The republics announced March 16 a statement of protest had been sent to Great Britain. Text of announcement: *N. Y. Times*, March 17, 1940, p. 34; *D. S. B.*, March 16, 1940, p. 306. King George acknowledged receipt of protest March 25. *N. Y. Times*, March 26, 1940, p. 8.
- 27 MONACO—UNITED STATES. Exchanged ratifications of the extradition treaty, signed Feb. 15, 1939. It entered into force March 28. *D. S. B.*, March 23, 1940, p. 332. Text: *U. S. T. S.*, No. 959.
- 28 PALESTINE. Great Britain published a white paper detailing the regulations controlling the sale of land by Arabs to Jews in Palestine. *N. Y. Times*, Feb. 29, 1940, pp. 1, 6; *London Times*, March 1, 1940, p. 8; *Cmd.* 6180. Summary: *B. I. N.*, March 23, 1940, p. 356.
- 28 PERMANENT COURT OF INTERNATIONAL JUSTICE. In a letter from the Foreign Secretary to the League of Nations Secretariat, Great Britain renewed for a further five years the jurisdiction of the court under the same reservations as before, with one added (jurisdiction in disputes arising out of events occurring at a time when H.M. Government were involved in hostilities). *B. I. N.*, March 23, 1940, pp. 380-381; *G. B. Misc. Ser.*, No. 10 (1940), *Cmd.* 6185.

- 29 CANADA—UNITED STATES. Notes exchanged at Washington regarding the establishment of a Board of Inquiry for the Great Lakes Fisheries. Texts: *D. S. B.*, March 2, 1940, pp. 273-275.
- 29 FINNISH LOAN. The United States Congress passed a bill permitting a \$20,000,000 loan to Finland for non-military supplies. *N. Y. Times*, March 2, 1940, p. 2.
- 29 GREAT BRITAIN—JAPAN. Nine Germans, seized Jan. 21 by British warships from the Japanese passenger liner *Asama Maru*, were transferred to Japanese authorities at Tokyo. *N. Y. Times*, Feb. 29, 1940, p. 7; *London Times*, March 1, 1940, p. 8.

March, 1940

- 1 BELGIUM—FRANCE. Signed trade agreement in Paris. *B. I. N.*, March 9, 1940, p. 313.
- 1 BELGIUM—GREAT BRITAIN. Signed trade agreement in London. *B. I. N.*, March 9, 1940, p. 321.
- 2 GERMANY—NETHERLANDS. Announcement made at The Hague of the one-year extension until June 30, 1941, of their clearing agreement. *N. Y. Times*, March 3, 1940, p. 37.
- 5-13 GERMAN COAL. Italian note of March 5 to Great Britain protested the blockade on German coal shipments. Text: *N. Y. Times*, March 5, 1940, p. 4. 7 Italian ships, seized in the English Channel, were released March 9 by Great Britain. *N. Y. Times*, March 10, 1940, p. 1. An official statement from Rome on March 13 announced signature of a protocol relative to shipments by land. *London Times*, March 14, 1940, p. 7.
- 8 FRANCE—SOVIET RUSSIA. Announcement made in Paris that the commercial agreements which have expired, have not been renewed. *London Times*, March 9, 1940, p. 5.
- 8 GERMANY—NORWAY. Norwegian note protested sinking of her ships contrary to international law. Summary: *London Times*, March 23, 1940, p. 5.
- 9 BELGIUM—UNITED STATES. Terminated the agreement concerning passport visas, signed April 15, 1927. *D. S. B.*, March 23, 1940, p. 332.
- 12-20 RUSSO-FINNISH WAR. Signed peace treaty and protocol March 12 at Moscow. Text: *N. Y. Times*, March 13, 1940, p. 2; *London Times*, March 14, 1940, p. 7; *D. S. B.*, Apr. 27, 1940, pp. 453-456. Ratifications exchanged March 21 at Moscow. *N. Y. Times*, March 21, 1940, p. 7. Printed in Supplement to this JOURNAL, p. 127.
- 13 GERMANY—HUNGARY. Signed additional cultural agreement at Budapest, supplementing that of 1936. *N. Y. Times*, March 14, 1940, p. 5.
- 14 POLISH WHITE BOOK. Diplomatic relations, 1933-1939, are covered in the book issued March 14. *London Times*, March 15, 1940, p. 7; *B. I. N.*, March 23, 1940, p. 390.
- 15-April 5 GRAF SPEE (battleship). Argentinian Ministry of the Interior announced March 15 the hastening of internment of the crew, delayed by negotiations with Germany regarding maintenance costs. *London Times*, March 16, 1940, p. 8. On April 5 it was announced that the officers and half the crew will be confined in the naval prison on an island in the River Plate. *N. Y. Times*, Apr. 6, 1940, p. 4. Following the escape of some officers and members of the crew, Argentina designated April 8 the time for internment. *London Times*, Apr. 10, 1940, p. 7.

- 16 BALTIC STATES. Conference of the three Baltic countries ended in Riga. A communiqué stated their belief in neutrality and their intention to adhere to the policy. *B. I. N.*, March 23, 1940, p. 387.
 - 18 GREAT BRITAIN—SPAIN. Signed commercial treaty at Madrid. *N. Y. Times*, March 19, 1940, p. 11; *London Times*, March 19, 1940, p. 8; *B. I. N.*, March 23, 1940, p. 383.
 - 20 ITALY—RUMANIA. Signed commercial treaty at Bucharest. *N. Y. Times*, Mar. 21, 1940, p. 11; *B. I. N.*, Apr. 6, 1940, p. 449.
 - 20 REYNAUD, PAUL. M. Reynaud took office as premier of France. *N. Y. Times*, March 21, 1940, p. 1.
 - 25 IRAN—SOVIET RUSSIA. Signed treaty of commerce and navigation. *B. I. N.*, Apr. 6, 1940, p. 442.
 - 26 MEXICO—UNITED STATES. By presidential decree Mexico voided title of three United States companies to a million and a half acres of land in Mexico. The Mexican Government claimed the titles had never been valid. *N. Y. Times*, March 27, 1940, p. 1.
 - 28 ITALY—SPAIN. Signed agreement at Madrid establishing air lines between the countries. *London Times*, March 29, 1940, p. 7; *B. I. N.*, Apr. 6, 1940, p. 450.
 - 28 NORWAY—UNITED STATES. Signed convention at Washington, providing for the disposition of the claims of Christoffer Hannevig and George R. Jones against the two governments. *D. S. B.*, March 30, 1940, p. 351; *N. Y. Times*, Apr. 1, 1940, p. 9.
 - 28-April 27 ALLIED SUPREME WAR COUNCIL. Sixth meeting in London, March 28. Text of declaration: *N. Y. Times*, March 29, 1940, p. 3; *London Times*, March 29, 1940, p. 8. Seventh session in London April 9. Text of statement: *N. Y. Times*, Apr. 10, 1940, p. 2; *London Times*, Apr. 10, 1940, p. 8. Eighth session in Paris, Apr. 22 and 23. *N. Y. Times*, Apr. 24, 1940, p. 6. Text of communiqué: *London Times*, Apr. 24, 1940, p. 6. Poland and Norway were represented at the 9th session held in London, Apr. 27. *N. Y. Times*, Apr. 28, 1940, pp. 1, 27. Text of communiqué: *London Times*, Apr. 29, 1940, p. 6; *B. I. N.*, May 4, 1940, p. 555.
 - 29-April 27 GERMAN WHITE BOOK. Sixteen documents issued at Berlin, alleged to have been taken from the Foreign Office archives of Poland. *B. I. N.*, Apr. 6, 1940, p. 436; *N. Y. Times*, March 30, 1940, p. 1. Excerpts: p. 4. Text of statement by Secretary Hull: *D. S. B.*, March 30, 1940, pp. 335-336. Fourth white book issued April 27. Excerpts: *N. Y. Times*, Apr. 28, 1940, p. 31.
 - 30 CHINA. The Japanese-sponsored régime, headed by Wang Ching-wei, was proclaimed at Nanking. *N. Y. Times*, March 30, 1940, p. 6. Secretary of State Hull's statement of March 30 declared the United States recognizes only the Chungking government. Text: *D. S. B.*, March 30, 1940, p. 343; *N. Y. Times*, March 31, 1940, p. 38.
 - 30 SYRIA AND THE LEBANON—TURKEY. Signed at Angora a treaty of friendship and good neighborliness. *London Times*, Apr. 1, 1940, p. 7; *B. I. N.*, Apr. 6, 1940, p. 453.
- April, 1940
- 2 DENMARK—GREAT BRITAIN. Signed trade agreement at London. *N. Y. Times*, Apr. 3, 1940, p. 1; *London Times*, Apr. 4, 1940, p. 7.
 - 2 LEAGUE OF NATIONS—LITHUANIA. Lithuania notified the League of its determination to retain the city of Vilna and surrounding territory ceded by Russia last Oct. 10 after the conquest of Poland. *N. Y. Times*, Apr. 3, 1940, p. 15.

- 3/May 1 MEXICAN OIL. United States' note to Mexico proposed arbitration of the dispute regarding expropriation of American oil properties. Text: *N. Y. Times*, Apr. 10, 1940, p. 16; *D. S. B.*, Apr. 13, 1940, pp. 380-383. The Mexican reply of May 1 was unfavorable. Text: *D. S. B.*, May 4, 1940, pp. 465-470.
- 4 LEAGUE OF NATIONS—CHINA. League of Nations transmitted to all members a note from the Chinese Government denouncing the Japanese-supported government at Nanking. *B. I. N.*, Apr. 20, 1940, p. 506.
- 5 BEAGLE CHANNEL. It became known that Chile and Argentina are now ready to submit the problem of a boundary line through Beagle Channel to arbitration. *N. Y. Times*, Apr. 6, 1940, p. 3.
- 5-24 EUROPEAN WAR. In similar communications to the Norwegian and Swedish Ministers at London, Great Britain gave notice that any further attempt by Russia on Finland or its ports would be regarded by the Allies as prejudicial to their war effort. *N. Y. Times*, Apr. 6, 1940, p. 1. Great Britain and France announced April 8 that three areas of Norwegian waters had been mined in the attempt to prevent shipment of Scandinavian ore to Germany. *N. Y. Times*, Apr. 8, 1940, p. 1. Norway protested April 8. *London Times*, Apr. 9, 1940, p. 8. The American Minister to Norway notified the Department of State on April 9 of the German invasion. *D. S. B.*, Apr. 13, 1940, p. 373; *N. Y. Times*, Apr. 9, 1940, p. 1. The British Foreign Office gave assurance of aid to Norway April 9. Text: *London Times*, Apr. 10, 1940, p. 7. Germany sent official memorandum to Norway in explanation of its invasion. Text: *N. Y. Times*, Apr. 10, 1940, p. 10; *London Times*, Apr. 10, 1940, p. 7; *Facts in Review* (N. Y.), Apr. 15, 1940, pp. 138-139. In an official review of events leading to the invasion, the Norwegian Government stated April 15 that sweeping demands had been presented by Germany four hours after German warships entered Oslo Fjord. *N. Y. Times*, Apr. 16, 1940, p. 1. Germany announced on April 24 unrestricted control over the occupied areas of Norway. *N. Y. Times*, Apr. 25, 1940, p. 1. The German proclamation of a state of war with Norway was contained in a decree of April 24. *N. Y. Times*, Apr. 28, 1940, p. 30. History of the invasion: *B. I. N.*, Apr. 20 and May 4, 1940, pp. 469-478; 534-541.
- 5/12 TRADE AGREEMENTS ACT. Passed by the Senate on April 5, and signed by President Roosevelt April 12. *Cong. Rec.* (daily), Apr. 5, 1940, p. 6181; *N. Y. Times*, Apr. 6 and 13, 1940, pp. 1 and 9.
- 9 DENMARK—GERMANY. A German note to Denmark, identical to one transmitted to Norway, announced on April 9 the occupation of strategic points and warned against resistance. Text: *N. Y. Times*, Apr. 10, 1940, p. 10; *London Times*, Apr. 10, 1940, p. 7. King Christian issued a proclamation asking his people to avoid resistance. Text: *N. Y. Times*, Apr. 10, p. 4.
- 10 COMBAT AREAS. President Roosevelt issued a proclamation defining new zones in the combat areas as a result of the Danish and Norwegian invasions by German troops. Text, together with Secretary of State Hull's statement: *N. Y. Times*, Apr. 11, 1940, p. 12; *D. S. B.*, Apr. 13, 1940, pp. 378-379. Supplement to this JOURNAL, p. 162.
- 10 HUNGARY—YUGOSLAVIA. Signed commercial agreement at Belgrade. *N. Y. Times*, Apr. 11, 1940, p. 44.
- 10 ICELAND. Announcement made that the British Foreign Office had been informed that the Icelandic Althing (parliament) had adopted resolutions declaring that the Government of Iceland will assume for the time being all Icelandic powers hitherto exercised by the Danish King. *N. Y. Times*, Apr. 11, 1940, p. 10.

- 10/May 7 TRANSFER OF DANISH AND NORWEGIAN PROPERTY. President Roosevelt issued order April 10 relating to transaction in foreign exchange, credit transfers, export of coin and currency. Text of order: *N. Y. Times*, Apr. 11, 1940, p. 13. President Roosevelt signed a bill on May 7 to clarify the authority under which an Executive Order of April 10 was issued freezing securities of Danish and Norwegian Governments and nationals in the United States. *N. Y. Times*, May 8, 1940, p. 7. Text of order: Supplement to this JOURNAL, p. 168.
- 11-27 DANUBE RIVER. Announcement made in Budapest that Germany had sent notes to Hungary, Yugoslavia and Bulgaria, demanding control of all shipping and shore policing on the Danube. *N. Y. Times*, Apr. 11, 1940, pp. 1, 3. Announcement was made April 27 that Hungary accepted the resolution adopted April 18 by the International Danubian Commission that the policing of those portions of the Danube traversing their territories should be supervised by Hungary, Yugoslavia, Rumania and Bulgaria, and they be responsible individually for the safety of traffic along their own stretches. Yugoslavia rejected the plan. *N. Y. Times*, Apr. 28, 1940, p. 20.
- 12 NETHERLANDS ORANGE BOOK. Second book issued. Lists violations of Dutch neutrality by Germany, and Dutch rights by Belgium and Great Britain. *N. Y. Times*, Apr. 13, 1940, p. 3; *B. I. N.*, Apr. 20, 1940, p. 507.
- 14-24 INTER-AMERICAN CONGRESS ON INDIAN LIFE. First congress met at Lake Patzcuaro, Michoacan State, Mexico, for the promotion and coördination of a continental program for the emancipation of Indian peoples in the Americas. Ten countries accepted the invitation to send representatives. Several resolutions were adopted, one for a Pan American bank for agricultural credit. *N. Y. Times*, Apr. 26, 1940, p. 9; *D. S. B.*, Apr. 13, 1940, pp. 389-390.
- 14 RUSSO-FINNISH WAR. Announcement made at Moscow that the Finnish-Russian frontier commission had fixed the new boundary and had settled upon the procedure of its demarcation. *N. Y. Times*, Apr. 15, 1940, p. 3.
- 15 LEAGUE OF NATIONS—DANZIG. League of Nations published the report of Dr. Burckhardt, former High Commissioner in Danzig. *N. Y. Times*, Apr. 16, 1940, p. 7. Text: *L. N. Doc.*, C.42.M.38.1940.VII.
- 17 POLISH BLACK BOOK. Polish press bureau in Paris issued a book on the German atrocities in Poland. *London Times*, Apr. 18, 1940, p. 5; *B. I. N.*, May 4, 1940, p. 563.
- 17-May 11 NETHERLANDS EAST INDIES. Secretary of State Hull issued a formal statement declaring any change in the *status quo* "could be prejudicial to the cause of stability, peace and security" in the entire Pacific area. Text: *N. Y. Times*, Apr. 18, 1940, p. 6; *D. S. B.*, Apr. 20, 1940, p. 411. On May 11 Foreign Minister Arita of Japan notified diplomatic representatives at Tokyo his country would not permit a change in status. *N. Y. Times*, May 12, 1940, p. 28. Text of Secretary Hull's statement of May 11: *D. S. B.*, May 11, 1940, pp. 493-494.
- 19 NORWEGIAN WHITE PAPER. The Norwegian Legation in London issued a White Book on the events leading to the German invasion. Text: *N. Y. Times*, Apr. 20, 1940, p. 4.
- 20 GERMANY—RUMANIA. Signed trade treaty at Bucharest. *N. Y. Times*, Apr. 21, 1940, p. 1.
- 22/24 GERMANY—RUMANIA. Signed two protocols: (1) fixing exchange rate for exports of oil and wheat; (2) providing for an increase of trade in coal from Germany and sheepskins from Rumania. *B. I. N.*, May 4, 1940, p. 564; *London Times*, Apr. 25, 1940, p. 5.

- 23 CHILE—UNITED STATES. Signed agreement providing for a military aviation mission from the United States. *D. S. B.*, Apr. 27, 1940, p. 453.
 - 25 ICELAND—UNITED STATES. Diplomatic officials were named to represent the two countries in the new situation created by German occupation of Denmark. *N. Y. Times*, Apr. 26, 1940, p. 6; *D. S. B.*, Apr. 27, 1940, p. 434.
 - 25/May 11 TRAVEL BY UNITED STATES CITIZENS. Extensions of regulations of the Neutrality Act of Nov. 4, 1939, prohibited travel on Norwegian, Belgian and Dutch ships. *D. S. B.*, Apr. 27 and May 11, 1940, pp. 431-432; 492. Supplement to this JOURNAL, pp. 167, 168.
 - 25/May 11 UNITED STATES NEUTRALITY. President Roosevelt issued proclamation of a state of war between Norway and Germany on April 25, and a similar proclamation concerning Belgium, The Netherlands and Luxemburg, and Germany, on May 11. Texts: *D. S. B.*, Apr. 27 and May 11, 1940, pp. 429-432; 489-491. Supplement to this JOURNAL, pp. 164, 168.
 - 26 FRANCE—SWITZERLAND. Signed war trade agreement in Berne. *London Times*, Apr. 27, 1940, p. 5; *B. I. N.*, May 4, 1940, p. 566.
 - 26 GREAT BRITAIN—SWITZERLAND. Signed war trade agreement whereby Switzerland will get supplies on the pledge they will not go to Germany. *N. Y. Times*, Apr. 27, 1940, p. 4; *London Times*, Apr. 27, 1940, p. 5; *B. I. N.*, May 4, 1940, p. 566.
 - 27 INTER-AMERICAN NEUTRALITY COMMITTEE. The Committee announced at Rio de Janeiro it had finished the draft of a resolution regarding the 300-mile neutral zone around the Americas, to be submitted to the Pan American Union first. *N. Y. Times*, Apr. 28, 1940, p. 33.
- May, 1940
- 1 GREENLAND—UNITED STATES. United States Department of State announced the provisional establishment of an American consulate at Gothaab, Greenland. *N. Y. Times*, May 2, 1940, p. 13; *D. S. B.*, May 4, 1940, p. 473.
 - 4 FRANCE—NETHERLANDS. The Dutch Government press announced representatives at Paris had agreed on French contraband control, designed to guarantee that imports will not reach Germany, in return for minimizing delays to Dutch shipping. *N. Y. Times*, May 5, 1940, p. 36.
 - 4/6 JAPAN—URUGUAY. Uruguay ratified on May 4 the trade and navigation treaty, signed in 1934. It was proclaimed by Japan on May 6. *N. Y. Times*, May 7, 1940, p. 9.
 - 6 GERMANY—SWEDEN. Swedish Foreign Office announced exchange of letters between King Gustav and Adolf Hitler in which the latter gave assurances of German respect for Swedish neutrality. *N. Y. Times*, May 7, 1940, p. 3.
 - 7 REFUGEES. Acting President of Ecuador authorized the Ministry of Colonization to sign a contract with the New World Resettlement Fund of New York to establish in Ecuador Spanish refugees, now in France. *N. Y. Times*, May 8, 1940, p. 2.
 - 8 MEXICAN AGRARIAN CLAIMS. Announcement made that the Mixed American-Mexican Agrarian Claims Commission, sitting in Mexico City since Dec. 19, 1938, will transfer to El Paso, Texas, during May. *N. Y. Times*, May 9, 1940, p. 10.
 - 10 CHURCHILL, WINSTON. Became Prime Minister following resignation of Neville Chamberlain. *N. Y. Times*, May 11, 1940, p. 1.
 - 10 ICELAND. British occupation of Iceland announced in London. Text of official communiqué: *N. Y. Times*, May 10, 1940, pp. 1, 3.

- 10 INTER-AMERICAN BANK. As the outgrowth of meetings of the Inter-American Financial and Economic Advisory Committee, a convention for the establishment of an Inter-American Bank was deposited at the Pan American Union, and opened for signature. Representatives of Bolivia, Colombia, Dominican Republic, Ecuador, Mexico, Nicaragua, Paraguay and the United States signed the convention which will remain open to the adhesion of other American Republics. Text and proposed charter for the bank: *D. S. B.*, May 11, 1940, pp. 512-525.
- 10 LITHUANIA—UNITED STATES. Signed consular convention at Washington, to remain in force for an initial period of ten years. It will enter into force 30 days after exchange of ratifications. *D. S. B.*, May 11, 1940, p. 512.
- 10-18 AMERICAN SCIENTIFIC CONGRESS. The opening session of the 8th Congress, held in Washington, was addressed by President Roosevelt on May 10. Text: *N. Y. Times*, May 11, 1940, p. 10. Secretary Hull spoke May 13 at the first plenary session. Text: *N. Y. Times*, May 14, 1940, p. 17. United States delegation and general program: *D. S. B.*, May 11, 1940, pp. 496-499.
- 10-15 EUROPEAN WAR. Germany invaded Belgium, Luxemburg and The Netherlands at 3 a.m., on May 10. The Dutch Government press service announced officially a state of war. *N. Y. Times*, May 10, 1940, p. 1. Text of Queen Wilhelmina's proclamation: p. 3. The Governor of the Dutch West Indies proclaimed a state of siege. *N. Y. Times*, May 11, 1940, p. 10. Queen Wilhelmina and the Dutch Government escaped to London, May 13. *N. Y. Times*, May 14, 1940, p. 1. The main Dutch Army surrendered May 15. *N. Y. Times*, May 15, 1940, p. 1.
- 10-15 TRANSFER OF BELGIAN AND DUTCH CREDITS. President Roosevelt ordered the Secretary of the Treasury on May 10 to freeze all Belgian and Dutch credits. *D. S. B.*, May 11, 1940, p. 493; *N. Y. Times*, May 10, 1940, p. 1. Text: Supplement to this JOURNAL, p. 168. Secretary Morgenthau revoked on May 15, at the request of the Dutch Minister, the license permitting withdrawals which had been granted earlier in the week. *N. Y. Times*, May 17, 1940, p. 9.
- 11 CHINA—DOMINICAN REPUBLIC. Established formal diplomatic relations with the signing of a treaty of friendship at Ciudad Trujillo. *N. Y. Times*, May 12, 1940, p. 40.
- 11 NETHERLANDS WEST INDIES. British Foreign Office announced that Allied troops had landed on the islands of Curaçao and Aruba. This action followed consultation with Dutch authorities. *N. Y. Times*, May 12, 1940, p. 1.
- 11 SOVIET RUSSIA—YUGOSLAVIA. Signed a trade and navigation treaty and an economic protocol. *N. Y. Times*, May 12 and 26, 1940, pp. 31 and 33.
- 11-13 NEUTRALITY PROCLAMATIONS. The following proclamations have been issued: United States, May 11. *D. S. B.*, May 11, 1940, p. 490; Spain, May 12. *N. Y. Times*, May 13, 1940, p. 5; Brazil and Cuba, May 13. *N. Y. Times*, May 14, 1940, p. 12.
- 13 BANK FOR INTERNATIONAL SETTLEMENTS. Headquarters moved from Basel to Château d'Oex in the Bernese Alps. *N. Y. Times*, May 14, 1940, p. 2.
- 13-14 BELGIAN AND DUTCH INVASION. The Panamanian Secretary of Foreign Relations and Communications embodied in a telegram to Secretary of State Hull a cablegram from Uruguay officials, invoking Arts. IV and V of the 9th Resolution, adopted Oct. 3, 1939 at Panama, with a view to consulting other American Governments concerning a joint declaration. The Department of State replied it would be glad to join other American Republics and agreed with the draft text proposed by Uruguay. *N. Y. Times*, May 15, 1940, pp. 1, 9; *D. S. B.*, May 18, 1940, pp. 541-542.

- 14 THE NETHERLANDS. Queen Wilhelmina issued a proclamation from London, where the government-in-exile had been set up, delegating authority in the homeland to the military, but retaining control of the Indies. Text: *N. Y. Times*, May 15, 1940, p. 3.

INTERNATIONAL CONVENTIONS

AIR MAIL AGREEMENT AND PROTOCOL. Buenos Aires, May 23, 1939.

Ratifications:

Mexico. Dec. 30, 1939. *D. S. B.*, May 11, 1940, p. 525.

Philippine Islands. *D. S. B.*, Apr. 20, 1940, p. 425.

AIR TRAFFIC. London, March 1, 1939.

Ratification: Italy. Nov. 30, 1939. *D. S. B.*, March 2, 1940, p. 273.

AIRCRAFT LIABILITY TO THIRD PARTIES. Rome, May 29, 1933.

Ratification: Italy. Nov. 30, 1939. *D. S. B.*, March 2, 1940, p. 273.

AIRCRAFT LIABILITY TO THIRD PARTIES. Additional Protocol. Brussels, Sept. 29, 1938.

Ratification: Italy. Nov. 30, 1939. *D. S. B.*, March 2, 1940, p. 273.

BROADCASTING CONVENTION AND FINAL ACT. Geneva, Sept. 23, 1936.

Ratification deposited: Chile. Feb. 20, 1940. *D. S. B.*, March 30, 1940, p. 350; *L. N. O. J.*, Jan./March, 1940, p. 8.

COLLECTION ACCOUNTS. Buenos Aires, May 23, 1939.

Adhesion deposited: Italy, colonies and possessions. Dec. 30, 1939. *D. S. B.*, March 16, 1940, p. 315.

Ratification: Greece. Dec. 14, 1939. *D. S. B.*, Feb. 24, 1940, p. 220.

EDUCATIONAL AND PUBLICITY FILMS. Buenos Aires, Dec. 23, 1936.

Ratification deposited: Chile. Feb. 9, 1940. *D. S. B.*, Feb. 24, 1940, p. 219.

EDUCATIONAL FILMS. Geneva, Oct. 11, 1933.

Ratification deposited: France (with reservation). Apr. 12, 1940. *D. S. B.*, May 18, 1940, p. 555.

EDUCATIONAL FILMS. Procès-verbal. Geneva, Sept. 12, 1938.

Application to: British Burma; Iraq, Apr. 10, 1940; Southern Rhodesia. *D. S. B.*, May 18, 1940, p. 555.

Signature: Hungary (not definitive). Feb. 15, 1940. *L. N. O. J.*, Jan./March, 1940, p. 9.

HYDRAULIC POWER. Geneva, Dec. 9, 1923.

Accession: Egypt. Jan. 29, 1940. *L. N. O. J.*, Jan./March 1940, p. 7.

INTELLECTUAL COÖPERATION. Final Act. Paris, Dec. 3, 1938.

Ratifications:

Dominican Republic. March 9, 1940.

Mexico. Dec. 30, 1939. *D. S. B.*, May 11, 1940, p. 511.

Ratifications deposited:

Egypt and South Africa. *Intellectual Coöperation Bulletin* (Paris), March, 1940, p. 128.

France. Aug. 17, 1939.

Latvia. Oct. 17, 1939.

Netherlands. Jan. 31, 1940.

Norway. June 9, 1939.

Poland. Nov. 4, 1939.

Portugal. Aug. 10, 1939.

Rumania. Aug. 3, 1939.

Switzerland. July 22, 1939.

In force: Jan. 31, 1940. *D. S. B.*, May 11, 1940, p. 511.

INTER-AMERICAN BANK. Washington, May 10, 1940.

Signatures: Bolivia, Colombia, Dominican Republic, Ecuador, Mexico, Nicaragua, Paraguay, United States.

Text (with proposed charter for an Inter-American Bank): *D. S. B.*, May 11, 1940, pp. 512-525.

INTER-AMERICAN CULTURAL RELATIONS. Buenos Aires, Dec. 23, 1936.

Ratification deposited: Paraguay. March 2, 1940. *D. S. B.*, March 16, 1940, p. 315.

INTER-AMERICAN RADIO COMMUNICATIONS ARRANGEMENT. Havana, Dec. 13, 1937.

Ratification deposited: Brazil (with reservation). Nov. 29, 1939. *D. S. B.*, Apr. 6, 1940, p. 367.

INTER-AMERICAN RADIO COMMUNICATIONS CONVENTION. Havana, Dec. 13, 1937.

Ratification deposited: Brazil (with reservation). Nov. 29, 1939. *D. S. B.*, Apr. 6, 1940, p. 367.

LEAGUE OF NATIONS COVENANT. Protocol of Amendment. Geneva, Sept. 30, 1938.

Ratification deposited: Lithuania. Feb. 2, 1940. *D. S. B.*, Apr. 6, 1940, p. 366; *L. N. O. J.*, Jan./March, 1940, p. 9.

LETTERS, ETC., OF DECLARED VALUE. Buenos Aires, May 23, 1939.

Adhesion deposited: Italy, colonies and possessions. Dec. 30, 1939.

Application to: Indo-China (by France). *D. S. B.*, March 16, 1940, p. 315.

Ratification: Greece. Dec. 14, 1939. *D. S. B.*, Feb. 24, 1940, p. 220.

LETTERS, ETC., OF DECLARED VALUE. Cairo, March 20, 1934.

Ratification: Ireland. Jan. 10, 1940. *D. S. B.*, Feb. 24, 1940, p. 221.

MINIMUM AGE (INDUSTRIAL EMPLOYMENT). Revised. Geneva, June 22, 1937.

Ratification: China. Feb. 21, 1940. *L. N. O. J.*, Jan./March, 1940, p. 10.

To come into force: 12 months after date of Chinese ratification. *D. S. B.*, Apr. 6, 1940, pp. 366-367.

MONEY ORDERS. Buenos Aires, May 23, 1939.

Adhesion deposited: Italy, colonies and possessions. Dec. 30, 1939.

Application to: Indo-China (by France). *D. S. B.*, March 16, 1940, p. 315.

Ratification: Greece. Dec. 14, 1939. *D. S. B.*, Feb. 24, 1940, p. 220.

NARCOTIC DRUG TRAFFIC. Procès-verbal. Geneva, June 26, 1936.

Ratifications deposited:

Egypt. Jan. 29, 1940. *D. S. B.*, March 16, 1940, p. 315.

France (with reservation). Jan. 16, 1940. *D. S. B.*, Feb. 24, 1940, p. 220; *L. N. O. J.*, Jan./March, 1940, p. 8.

NORTH AMERICAN REGIONAL BROADCASTING. Havana, Dec. 13, 1937.

Ratification deposited: Mexico. March 29, 1940.

To become operative after the necessary technical studies have been completed by the various governments, since the necessary number of ratifications has been deposited. *D. S. B.*, Apr. 6, 1940, p. 368.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.

Ratification deposited: France (exclusive of colonies, etc.). Jan. 16, 1940. *D. S. B.*, March 9, 1940, p. 290; *L. N. O. J.*, Jan./March, p. 7.

OPIUM CONVENTION. 2d. The Hague, Jan. 23, 1912.

Application to: Burma. Feb. 20, 1940. *L. N. O. J.*, Jan./March, 1940, p. 7.

PARCEL POST. Buenos Aires, May 23, 1939.

Adhesion deposited: Italy, colonies and possessions. Dec. 30, 1939.

- Application to:* Indo-China (by France). *D. S. B.*, March 16, 1940, p. 315.
- Ratifications:*
Greece. Dec. 14, 1939. *D. S. B.*, Feb. 24, 1940, p. 220.
Mexico. Dec. 30, 1939. *D. S. B.*, May 11, 1940, p. 526.
- PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.
- Termination:*
Great Britain. Feb. 28, 1940. *D. S. B.*, Apr. 20, 1940, p. 424.
India. Feb. 28, 1940. *D. S. B.*, Apr. 27, 1940, p. 451.
- Renewal* (for 5 years):
Greece. Feb. 20, 1940. *D. S. B.*, Apr. 13, 1940, p. 398; *L. N. O. J.*, Jan./March, 1940, p. 7.
Great Britain (with reservations). Feb. 28, 1940, *D. S. B.*, Apr. 20, 1940, p. 423.
India. *D. S. B.*, Apr. 27, 1940, p. 452.
New Zealand (with reservation). *D. S. B.*, May 18, 1940, p. 554.
- POSTAL CHECKS. Buenos Aires, May 23, 1939.
- Adhesion deposited:* Italy, colonies and possessions. Dec. 30, 1939. *D. S. B.*, March 16, 1940, p. 315.
- Ratification:* Greece. Dec. 14, 1939. *D. S. B.*, Feb. 24, 1940, p. 220.
- POSTAL SUBSCRIPTIONS TO NEWSPAPERS. Buenos Aires, May 23, 1939.
- Adhesion deposited:* Italy, colonies and possessions. Dec. 30, 1939. *D. S. B.*, March 16, 1940, p. 315.
- Ratification:* Greece. Dec. 14, 1939. *D. S. B.*, Feb. 24, 1940, p. 220.
- POWERS OF ATTORNEY. Protocol. Washington, Feb. 17, 1940.
- Opened for signature:* Feb. 17, 1940.
- Signature:*
Panama (*ad referendum*). Apr. 10, 1940. *D. S. B.*, Apr. 20, 1940, p. 424.
Venezuela (with modification). Feb. 20, 1940.
- Text:* *D. S. B.*, March 9, 1940, pp. 287-290.
- RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Revision. Cairo, April 8, 1938.
- Adhesion:* India. *D. S. B.*, May 4, 1940, p. 481.
- RIGHTS AND DUTIES OF STATES. Montevideo, Dec. 26, 1933.
- Ratification deposited:* Venezuela. Feb. 13, 1940. *D. S. B.*, Feb. 24, 1940, p. 219.
- ROAD SIGNALS. Geneva, March 30, 1931.
- Application to:* Netherlands Indies. Jan. 29, 1940. *L. N. O. J.*, Jan./March, 1940, p. 8.
- SALVAGE OF AIRCRAFT. Brussels, Sept. 29, 1938.
- Adhesion:* Mexico. Dec. 30, 1939. *D. S. B.*, May 11, 1940, p. 512.
- Ratification:* Italy. Nov. 30, 1939. *D. S. B.*, March 2, 1940, p. 273.
- SANITARY CONVENTION. Paris, June 21, 1926.
- Ratification deposited:* Greece. Jan. 10, 1940. *D. S. B.*, March 2, 1940, p. 273.
- SANITARY CONVENTION. Paris, June 21, 1926. Modification. Paris, Oct. 31, 1938.
- Promulgation:* Mexico. Dec. 30, 1939. *D. S. B.*, May 11, 1940, pp. 511-512.
- SEAMEN'S ARTICLES OF AGREEMENT. Geneva, June 24, 1926.
- Ratification deposited:* Norway. March 29, 1940. *D. S. B.*, May 4, 1940, p. 482.
- SMUGGLING. Buenos Aires, June 19, 1935.
- Ratification:* Chile. Dec. 13, 1939.
- Ratification deposited:* Chile. Feb. 9, 1940. *D. S. B.*, Feb. 24, 1940, p. 220.
- TELEGRAPH REGULATIONS AND PROTOCOL. Cairo, Apr. 8, 1938.
- Acceptance:* India. *D. S. B.*, May 4, 1940, p. 481.

TELEPHONE REGULATIONS. Cairo, Apr. 8, 1938.

Adhesion: Thailand. *D. S. B.*, May 4, 1940, p. 481.

UNIVERSAL POSTAL CONVENTION. Buenos Aires, May 23, 1939.

Adhesion deposited: Italy, colonies and possessions. Dec. 30, 1939.

Application to:

Indo-China (by France). *D. S. B.*, March 16, 1940, p. 315.

Papua and Norfolk Island, New Guinea and Nauru (by Great Britain). March 2, 1940. *D. S. B.*, Apr. 13, 1940, p. 399.

Ratifications:

Greece. Dec. 14, 1939. *D. S. B.*, Feb. 24, 1940, p. 220.

Mexico. Dec. 30, 1939. *D. S. B.*, May 11, 1940, p. 525.

Philippine Islands. *D. S. B.*, Apr. 20, 1940, p. 425.

Ratification deposited:

United States. Feb. 24, 1940. *D. S. B.*, May 4, 1940, p. 481.

UNIVERSAL POSTAL CONVENTION. Cairo, March 20, 1934.

Ratification deposited: Ireland. Jan. 10, 1940. *D. S. B.*, Feb. 24, 1940, p. 220.

DOROTHY R. DART

GREAT BRITAIN: COURT OF CRIMINAL APPEAL

(Humphreys, Singleton, and Lewis, JJ.)

REX *v.* KETTER *

Feb. 21, 1939

By S. 27 of the British Nationality and Status of Aliens Act, 1914, as amended by S. 2 (6) of the British Nationality and Status of Aliens Act, 1918: "‘British subject’ means a person who is a natural-born British subject, or a person to whom a certificate of naturalization has been granted, or a person who has become a subject of his Majesty by reason of any annexation of territory."

The appellant, who was born in Jerusalem and continued thereafter to reside in Palestine, came to England in 1937. In December, 1938, he was convicted on a charge that he being an alien failed to comply with an order made by the Home Secretary requiring him to leave the country. He was in possession of a passport entitled "British Passport—Palestine" issued by the British High Commissioner in Palestine. He appealed on the ground that in consequence of the effect of the Palestine Mandate and the Treaty of Lausanne he was not an alien, but a British subject.

Held, that the appellant was not a British subject.

This was an appeal by Isaac David Ketter against his conviction at the Central Criminal Court on December 13, 1938, on an indictment containing two counts: (1) That on November 12, 1938, he being an alien effected a change of residence and failed to report his arrival at his new place of residence within 48 hours; and (2) that on November 25, 1938, he being an alien subject to an order made by the Home Secretary varying the conditions of the leave granted to him to land and requiring him to leave the United Kingdom by September 30, 1938, failed to comply with such order. The appellant was sentenced to 11 days' imprisonment and recommended for deportation.

The sole ground of appeal was that the appellant was not an alien but a British subject.

The appellant was born in Jerusalem of Jewish parents on November 16, 1911. He came to England in 1937, having been granted a passport signed by the High Commissioner in Palestine and entitled "British Passport—Palestine." He was permitted to land on certain conditions and to remain for a limited period. That period was subsequently extended from time to time, but by an order made by the Home Secretary on September 14, 1938, the appellant was required to leave England by September 30. It was in respect of the appellant's failure to comply with that order that the present proceedings were taken.

Mr. Justice Singleton, in delivering the judgment of the court, stated the facts set out above and continued:

The only question before this court is whether the appellant is an alien within the British Nationality and Status of Aliens Act, 1914. It is not disputed that he committed the offences alleged if he is an alien. By

* 55 Times Law Reports, p. 449. Reported by H. A. Palmer, Esq., Barrister-at-Law.

Section 27 of the Act "alien" means a person who is not a British subject, and by the same section, as amended by the British Nationality and Status of Aliens Act, 1918, "British subject" means "a person who is a natural-born British subject, or a person to whom a certificate of naturalization has been granted, or a person who has become a subject of his Majesty by reason of any annexation of territory."

It is common ground that in any such proceedings as the present the onus of proving that he is not an alien lies on the person charged. At the trial at the Central Criminal Court Mr. Lester based his case almost wholly on the passport issued to the appellant which he claimed was a British passport. Two specimen passports were exhibited at the trial to explain the difference between a British passport and a Palestine passport, which latter is issued by his Majesty's High Commissioner. The jury added a rider to their verdict that the words on the Palestine passport were misleading. But it is difficult to see that this could lead the appellant to think that he is a British subject or could make him one.

On appeal Mr. Lester relied on wider grounds. He referred to the Treaty of Peace with Turkey, which was signed at Lausanne on July 24, 1923, and in particular to Article 30 of that treaty which deals with nationality and provides:

Turkish subjects habitually resident in territory which in accordance with the provisions of the present treaty is detached from Turkey will become *ipso facto*, in the conditions laid down by the local law, nationals of the state to which such territory is transferred.

He submitted that under that article Palestine was transferred to Great Britain and every Turkish subject resident in Palestine became *ipso facto* a subject of Great Britain. It was agreed that the appellant had been a Turkish subject. Certain other parts of Turkey were transferred to other states by that treaty and it appears to us that Article 30 was intended to deal and was dealing only with those territories.

Mr. Lester also relied on the mandate for Palestine which was given to Great Britain on July 24, 1922. The mandate itself begins by recitals:

Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations, to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire . . . and whereas the Principal Allied Powers have selected his Britannic Majesty as the mandatory for Palestine . . . and whereas by the aforementioned Article 22 . . . it is provided that the degree of authority, control or administration to be exercised by the mandatory, not having been previously agreed upon by the members of the League, shall be explicitly defined by the Council of the League of Nations: [the Council] confirming the said mandate, defines its terms as follows: Article 1. The mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate.

Then by Article 7:

The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.

By Article 12:

The mandatory shall be entrusted with the control of the foreign relations of Palestine and the right to issue *exequaturs* to consuls appointed by foreign Powers. He shall also be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits.

There are other articles which are of less importance, except perhaps Article 5, which provides:

The mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the government of any foreign Power.

The true effect of this is that his Britannic Majesty accepted the mandate in respect of Palestine and undertook to exercise it on behalf of the League of Nations in conformity with the provisions contained in it. There was no provision in Article 30 for the transfer of territory to Great Britain. If there had been, there would have been no need for the mandate.

The Palestine Order in Council of 1922 followed in which the territories to which the mandate applied are dealt with. Part II of that order relates to the Executive, Part III to the Legislature, and Part V to the Judiciary; and Part VIII is general. Part VIII contains three paragraphs of importance. Paragraph 87 provides:

The High Commissioner may by proclamation in the Gazette at any time within one year from the date of the commencement of this order . . . vary, annul or add to any of the provisions of this order in order to carry out the purposes of the same, and may provide for any other matters necessary in order to carry into effect the provisions thereof.

Paragraph 88 provides: "His Majesty, his heirs and successors in Council, may at any time revoke, alter or amend this order." And by paragraph 89:

There shall be reserved to his Majesty, his heirs and successors, the right, with the advice of his or their Privy Council, from time to time to make all such laws or ordinances as may appear to him or them necessary for the peace, order, and good government of Palestine in accordance with the mandate conferred on him.

In 1925 there came into being the Palestinian Citizenship Order, 1925. That order was made in exercise of the powers under the Foreign Jurisdiction Act, 1890. That Act defines "foreign country" in Section 16 as meaning

"any country or place out of her Majesty's dominions." The order contains two recitals:

Whereas by treaty, capitulation, grant, usage, sufferance and other lawful means his Majesty has power and jurisdiction within Palestine: And whereas it is desirable to regulate the grant and acquisition of Palestinian citizenship.

Paragraph 1 (1) provides: "Turkish subjects habitually resident in the territory of Palestine upon the 1st day of August, 1925, shall become Palestinian citizens."

The appellant was a Turkish subject habitually resident in the territory of Palestine on August 1, 1925. *Prima facie*, therefore, the order makes it clear that the appellant became a Palestine citizen. But Mr. Lester has argued that that order—the Palestinian Citizenship Order, 1925—at least as regards the first paragraph, is of no force or validity as having been made by the Mandatory Power and not by the Administration in Palestine who were the responsible authority under Article 7 of the mandate, and he says that there is a distinction made in the mandate between the Mandatory Power and the Administration. Even if we accepted that argument—and we are far from saying that we do accept it—in our opinion the result would be that the appellant remained a Turkish subject and not that he became a British subject.

Mr. Lester said that Great Britain had no power to make the appellant a subject of any country except its own country. The answer to that is that nothing has been done in law to make him a subject of Great Britain. He is not within the provisions of the British Nationality and Status of Aliens Act, 1914, because there has been no annexation of Palestine. It follows that he is not a British subject, but an alien.

Our attention was called to a case decided in the High Court of Palestine, Attorney-General v. Goralschwili (McNair and Lauterpacht's *Annual Digest of Public International Law Cases for 1925-1926*, p. 47). The facts in that case were that application was made by the Italian Government to the Government of Palestine for the extradition to Italy of two persons resident in Jerusalem. By the Anglo-Italian Extradition Treaty, 1873, which was applied to Palestine, British subjects were not to be surrendered to Italy nor Italian subjects to Great Britain. The accused persons had obtained provisional certificates of special citizenship, which were issued by the government before the enactment of the Palestinian Citizenship Order. It was contended that they should be treated as British subjects on the ground that the subjects of a mandated territory obtained the nationality of the mandatory state. Nevertheless, an order of extradition was made and, on application to the High Court for a writ of *habeas corpus*, the court held that the subjects of the mandated territory of Palestine had not become British subjects and might be surrendered to Italy. It is satisfactory to know that our view accords with that of the High Court of Palestine.

The appeal fails and must be dismissed.

GREAT BRITAIN: COURT OF APPEAL

(Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.)

KAWASAKI KISEN KABUSHIKI OF KOBE *v.* BANTHAM S.S. COMPANY,
LIMITED *

March 2, 1939

A charterparty contained the words: "Charterers and owners to have the liberty of cancelling this charterparty if war breaks out involving Japan." On September 18, 1937, the owners gave the charterers notice withdrawing the chartered steamer from service and cancelling the charterparty on the ground that war had broken out involving Japan. The charterers contended that the cancellation was wrongful and claimed damages in respect thereof. The umpire in the arbitration proceedings held that the military operations which had broken out between Japan and China constituted by September 18, 1937, a war in the ordinary and popular meaning of the word. Goddard, J., supported the decision of the umpire. On appeal by the charterers,

Held, that the court was not concerned in the present case with whether the British Government regarded a state of war as existing between Japan and China, but whether on the true construction of the charterparty the owners were entitled to cancel it; that the finding of the arbitrator was unassailable; and that the appeal must be dismissed.

Decision of Goddard, J. (54 *The Times* L.R. 901), affirmed.

This was an appeal by the charterers from the decision of Mr. Justice Goddard that within the clause of a charterparty dated June 2, 1936, war had on September 18, 1937, broken out involving Japan. The decision was come to on a special case stated by the umpire in an arbitration between shipowners and charterers.

By a charterparty dated June 2, 1936, a steamer belonging to the owners was taken on a time charter by the charterers. Clause 31 of the charterparty provided as follows: "Charterers and owners to have the liberty of cancelling this charterparty if war breaks out involving Japan."

The steamer chartered under the charterparty was the *Nailsea Meadow*. On September 18, 1937, the owners gave the charterers notice withdrawing the steamer from service and cancelling the charter on the ground that war had broken out involving Japan. The charterers contended that the cancellation was wrongful, and claimed damages in respect thereof, and the claim was the subject of the arbitration.

At the hearing of the arbitration the charterers conceded that extensive fighting had taken place between the armies of China and Japan, but they contended that on September 18, 1937, those countries were not at war because (a) no declaration of war had been made by China or Japan; (b) diplomatic relations had not been severed between China and Japan; (c) the British Government had not recognized a state of war between China and Japan; (d) the United States Government had not brought into force the Neutrality Act; and (e) neither of the contending States had an *animus belligerendi*.

The umpire found as to (a) that no such declaration of war had been made; as to (b) and (d) that they were admitted by the owners. As to (c), letters

* 55 *Times* Law Reports, p. 503. Reported by H. C. Garsta, Esq., Barrister-at-Law.

from the British Foreign Office dated September 11, 1937, and January 24, 1938, were put in. The charterers contended that the statements therein were conclusive.

On the evidence the umpire found a number of facts as to the movement of troops and military operations and other matters at the relevant time.

The owners contended (a) that the words used in Clause 31 of the charterparty should be given their ordinary and popular meaning rather than their technical and scientific meaning in international law; (b) that in Clause 31 the word "war" must be given its natural meaning and must not be construed as a word of art; (c) that war had broken out before September 18; (d) that both Japan and China had engaged in military operations on a vast scale *animo belligerendi*, and there was a state of war as understood in international law; (e) that recognition of belligerency by other Powers was not necessary, and that a state of war necessarily preceded such recognition.

The umpire found as a fact that before September 18 (a) Japan intended to drive the Chinese armies out of Northern China and from the Shanghai area, defeat them into submission, and enforce her policy on the Government of China; (b) China intended to resist any advance by Japanese troops into her territory to the utmost of the power of her armies, and likewise to oppose any control by Japan over the local and national government and administration of the country.

If and so far as it was a question of fact, the umpire found that the military operations in September, up to and including September 18, were undertaken by both Japan and China *animo belligerendi*.

If and so far as it was a question of fact, he found that by September 18 war had broken out involving Japan, and that the military operations constituted a war, in the ordinary and popular meaning of that word, between Japan and China.

Subject to the opinion of the court he awarded that the charterers were not entitled to recover damages against the owners. The question for the opinion of the court was whether on the true construction of the charterparty and on the facts found the umpire was entitled to award that on September 18, 1937, war had broken out involving Japan.

Mr. Justice Goddard held that in a document drawn up by business men for business purposes the language used must be given its ordinary meaning and therefore that the military operations which had broken out between Japan and China constituted by September 18, 1937, a war within the meaning of the clause in the charterparty.

The charterers appealed.

The Master of the Rolls, giving judgment, said that in his opinion, this was a clear case and the judgment of Mr. Justice Goddard was perfectly right. The main argument of Sir Stafford Cripps was that, in matters of state, it was a rule of law in this country that the decision and statement of the Executive as to the particular state of affairs were not merely conclusive

but essential, and as a basis of that rule he said that it was undesirable that the court should decide matters of state as that might embarrass the Executive. He (his Lordship) did not find that fear was an attractive basis on which to build a rule of English law, and in the present case it had an air of unreality when it was found that the Executive when approached informed the inquirer that the situation was indeterminate and that his Majesty's Government were not prepared to say that in their view a state of war existed involving Japan, but that as the question arose with regard to a clause in a charterparty it might well be a case for the construction of the clause by the court.

He (his Lordship) found the proposition contended for quite unacceptable and without authority. The court had been referred to a number of cases in which the question of judicial notice being taken by the courts of this country of certain matters of state, whether municipal or foreign, was concerned. Manifestly, if the question which arose was whether this country was at war that was a matter of which the courts of this country would take judicial notice, and, if unable to do so of their own knowledge, would inquire of the Executive. That was an example of what took place in *Janson v. Driefontein Consolidated Mines, Limited* (18 *The Times* L.R. 796; [1902] A.C. 484). That had nothing to do with the present case. Other cases referred to were cases where the status of a foreign sovereign was in question, and that question depended on his recognition by the English Government. Cases of that kind had nothing to do with the present case.

The court was not concerned here with whether the British Government regarded a state of war as existing between Japan and China. The question was whether on the true construction of the particular document the owners were entitled to cancel the charterparty, which they were only entitled to do if war had broken out on the relevant date affecting Japan. In his judgment, it was impossible in construing that clause to have regard to the view expressed by the British Government. War might break out without being recognized by the British Government. *Thelluson v. Cosling* (4 Esp. 266) lent support to that view.

The second point which had been raised was that in the expression "if war breaks out involving Japan" "war" had not a loose popular meaning but a technical meaning to be found in the principles of international law. Where were those principles to be found? It was suggested that they were to be found in the writings of various writers on international law, but those writers did not speak with one voice, and it was possible to find definitions of war which were inconsistent.

He had asked for any authority defining war for the purposes of the municipal law of this country, but no such authority could be cited.

Sir Stafford Cripps said that an essential element of war was an *animus belligerendi* on the part of both, or at least one, of the combatants. What *animus belligerendi* meant was again a matter of obscurity, and to define

war by relation to it came near to defining war by itself. One element of war insisted on was that diplomatic relations should have been severed, and it was said to be conclusive, but in his view that was merely an element to be taken into account, and, if so, it became a question of fact whether there was an *animus belligerandi*. The arbitrator had found as a matter of fact that it existed.

Sir Stafford Cripps contended that there was no evidence to support that finding of fact, and certain statements of persons in the field and of representatives of the two governments were relied on. But acts spoke more strongly than words and it was open to the arbitrator on the facts found by him to find that war had broken out at the relevant date. The finding of fact of the arbitrator was unassailable. That concluded the matter, and the appeal must be dismissed.

Lord Justice MacKinnon and Lord Justice Finlay concurred.

BOOK REVIEWS AND NOTES

Making International Law Work. By George W. Keeton and Georg Schwarzenberger. (New Commonwealth Institute Monographs, Series A, No. 5.) London: Peace Book Co., 1939. pp. 214. Bibliographies and Index.

This volume is a compilation of Extension Lectures given under the auspices of the University of London by Professor George W. Keeton, the Director, and Dr. Georg Schwarzenberger, the Secretary of the New Commonwealth Institute. The title is somewhat misleading; for these lectures show not so much how to make international law work in the future as why international law has failed and was bound to fail in the past. With respect to this analytical task, the reviewer has not seen a better contribution to an understanding of the basic problems of international law and their political and general sociological background. As compared with Brierly's *The Law of Nations*, this volume, written on a more popular level, easily holds its own, and certainly no higher praise can be given to a book of this kind. We recommend especially the chapters on the social background and the functions of international law, sovereignty, and international morality.

The philosophy underlying the analytical explanations, and the suggestions for reform growing out of it, are, of course, debatable. We agree with the authors that the weakness of international law is inherent in the very structure of the international society; but we do not share their emphasis on the incompatibility between force, as manifested in power politics, and law. There is no such thing as law without force, nor has there ever been organized force without law. Power politics is not an artificial attribute of our social life; it grows out of the very nature of man as a social being. It cannot be destroyed with moral arguments. And national federations such as imperial Germany, Switzerland, and the United States, by which the authors exemplify the possibility of super-national federalism, owe their existence not to the rule of law as opposed to the rule of force, but to an indissoluble combination of cultural ties, economic interests, ideal aspirations, and—power politics; elements which, after establishing actual union, were institutionalized in legal rules.

HANS J. MORGENTHAU

Scandinavia: The Background for Neutrality. By Alma Luise Olson. Philadelphia, New York, London, Toronto: J. B. Lippincott Co., 1940. pp. 358. Index. \$2.50.

This book is strange and painful reading. It was written before, but only shortly before, the Nazi invasion and occupation of Denmark and Norway; it was evidently completed after the Russian invasion of Finland had begun, so that there were hurriedly included a few sorrowful paragraphs about that

event, but without any change in the author's point of view. Miss Olson has for many years lived in, and, as a newspaper woman, written about the five Scandinavian countries of Sweden, Norway, Denmark, Iceland, and Finland. She has become a devoted admirer of their civilization and their way of life, and she has brief but interesting chapters about the people, their history, their manners, their ideals, their culture, their extraordinarily enlightened social and political systems. But the principal purpose of the book is to extol the doctrine of neutrality, and to show how that neutrality, as formulated and practiced by these Scandinavian countries, has kept them out of the "spot news" of the day, has preserved their peace and independence, and maintained their prosperity.

Together with her admiration of this Scandinavian concept of "perpetual neutrality," as she calls it, goes an equally intense admiration of Scandinavian union, although it seems pretty clear now that this concept of union never did fit into the concept of complete neutrality and that it of course failed when put to the test, in view of the stronger feeling for neutrality than for unity. Miss Olson herself points out that, although these five countries separately are small, taken together they "approximate the size of California, Texas, and Washington, or of France, Spain, England, and Scotland combined in Europe" (p. 21); that, in spite of the talk of and plans for Scandinavian unity, and the fact that together they could have produced a very respectable military force, "in case of attack, they aim, separately, to defend their independence and neutrality" (p. 22). Miss Olson insists that this feeling for neutrality was so strong that if a real world union were organized, the Scandinavian nations "would probably decline and assert instead their attempt to maintain neutrality" (p. 337); and, having demonstrated that the Scandinavian Union would be completely separatist and mutually non-assisting, nevertheless "Union, 1939, is as true fundamentally as Union, 1914, and if transiently the five go separate ways there is no real disunion" (p. 339). Of course no one can be certain that a policy of genuine coöperation and mutual assistance would have saved the independence of these countries, but certainly it is clear now that the policy of neutrality, with its inevitable separatism, threw that independence away. It is quite probable that the Scandinavians themselves are not nearly so smugly sentimental about their own policy as is Miss Olson.

With the invasion of Finland going on when she wrote, the author adds to the painful lack of realism in her book by reading a lesson to the United States out of Scandinavian experience. "Through union and neutrality the North has tried to work toward a permanent philosophy of peace and a government by law and order. The American Way points also to union and neutrality, with the added contribution of moral embargoes on sales of war materials to aggressors who launch air attacks on civilian populations. . . . Can any human beings, except those who are victims of mass hysteria and propaganda, insist that they abhor war without simultaneously noting

that preparedness is merely the vicious circle that increases the machines of destruction?" (p. 348). Let the Finns and the Norwegians and the Danes answer this kind of sentimental nonsense, as fortunately, the American people are giving answer, if a belated answer. CLARENCE A. BERDAHL

Nederlands Aandeel in de Ontwikkeling van het Onzijdigheidsrecht gedurende den Wereldoorlog. (Bibliotheca Visseriana, Vol. XIII.) By F. J. A. Huart. Leyden: E. J. Brill, 1939. pp. xxxii, 373. Index. Gld. 16.

This book, which bears the title, *Netherlands' Share in the Development of Neutrality Law during the World War*, was completed in 1935 but was not published until 1939, after the death of the author. Whether the Netherlands World War regulations had made any contribution to the development of the law of neutrality could not be determined until the outbreak of another major war in Europe. The test has arrived. Today The Netherlands finds itself in very much the same position as in the World War, and yet how different! While the Dutch regulations have not been without influence on the neutrality regulations issued in the present war by other countries, neutrality regulations have taken new and unexpected directions, as, for example, those of the United States and the Pan American countries, and neutrality as a policy has received cruel blows among just those countries which were supposed to have reduced it to a science through a century and a quarter of successful practice.

The Netherlands regulation prohibiting the entrance within its territorial waters of all warships and assimilating armed merchantmen to warships was generally acclaimed as a wise rule and as so much superior to the United States regulation which first made the status of armed merchantmen dependent upon the defensive character of its weapons and later upon the presence on board of a "commission of war." But in the present war the rôles are somewhat reversed. While the Dutch regulations now permit the entrance of merchant vessels equipped with light arms, the United States regulations prohibit American merchant vessels to arm and gives the President the power to prohibit the use of American ports to armed merchantmen. The abandonment by the Netherlands Government of the World War regulation is very probably due to the fear that the arming of merchantmen would become nearly a universal practice, and that if the prohibition were maintained it would seriously injure Dutch harbor and transit traffic.

It is also interesting to note that both The Netherlands and the United States joined in some form of collective neutrality in the present war. The collective neutrality agreement of the Oslo states was very mild and quickly came to an inglorious end. Of all the neutrals in the World War, the Netherlands Government was the only one which protested the use of the neutral flag as a violation of international law. This position has now been adopted by the United States in the Neutrality Law of 1939. During

the World War the Netherlands Government emphatically rejected the argument of the belligerents in justifying their illegal measures on the grounds of retaliation. The Dutch position was logical and irrefutable. Yet belligerent practices in this war began where they left off in the last. So the Dutch regulations and practices during the World War did not contribute a great deal to the development of neutrality law after all. Whether that is due to the unusual character of the present war or to the nature of neutrality itself, it is still too early to determine.

Students of neutrality will find this a useful book. It examines the Dutch measures and positions with great detail. Non-Netherlanders will not find the discussions of constitutional and legal problems involved in the enforcement of the neutrality regulations very interesting or profitable, but there is much in the book that amply repays its use.

A. VANDENBOSCH

What Germany Forgot. By James T. Shotwell. New York: Macmillan Co., 1940. pp. viii, 152. \$1.50.

This book was begun as the introduction to one of the volumes of the monumental *Economic and Social History of the World War*. In expanding his argument to book length, Professor Shotwell has placed students of international relations greatly in debt to him. His analysis of the much maligned Treaty of Versailles and its much misunderstood consequences is timely, authoritative, and sensible.

Professor Shotwell shows the fallacy of the widespread belief that the sufferings of Germany are traceable directly to the terms of peace. Taking those articles of the treaty which have been most criticized, he points out that they could not have produced the evil effects of which Hitler and his followers have complained. Neither reparations, the disarmament of Germany, the territorial settlements of the treaty, nor the so-called stigma of war guilt brought about the collapse of the nation.

Rather, the war and post-war policies pursued by the German Government itself—and these include the acts of the Hitler régime—led to the breakdown of the economic, political, and cultural life of the country. The "Hindenburg Program," which mobilized the nation as a whole for war, was the first step toward National Socialism. The inflation of 1922 and 1923 resulted, in a large measure, from the refusal of Germany to put its fiscal house in order. Instead of assuming a heavier tax burden, as other peoples were doing, the Germans resorted to borrowing on an extensive, and as it proved, a disastrous scale. The economic collapse which followed was made worse by the revival of the military tradition and by the psychosis of war guilt.

France, England, and the United States are not blameless for the confusion of the past twenty years. But for the sufferings of Germany and their widespread repercussions, Germany herself, more than any other nation or group of nations, is responsible. Professor Shotwell places this view before us in

bold relief, and in a convincing manner. Also, in depicting the plight of Germany he develops a conclusive case against the entire institution of war.

S. D. MYRES, JR.

The Saar Plebiscite. With a Collection of Official Documents. By Sarah Wambaugh. Cambridge: Harvard University Press; London: Humphrey Milford, Oxford University Press, 1940. pp. xvi, 489. Illustrated. Index. \$5.00.

Miss Wambaugh, the leading authority on international plebiscites, has given in this volume the final account of the attempt at international government and plebiscite in the Saar Basin. The introductory part deals with the historic, economic, and sociological background of the region; the second part gives the history of the League régime until the beginning of the Nazi government; the third part describes the preparations for the plebiscite; and the fourth part gives an analysis of the vote itself. A collection of the official documents relative to the plebiscite follows; maps and photographs illustrate the text.

The wealth of detailed information which Miss Wambaugh has assembled in this volume is remarkable, and so is the high degree of understanding and objectivity with which she evaluates the facts. From her account there emerges the picture of a régime, hated and vilified beyond all measure, which was able to hand the territory over to Germany "not only free of any public debt, but with over 65,000,000 francs and \$270,000 in the treasury, together with immovable assets representing capital expenditure amounting to 110,000,000 francs" (p. 312). There emerges furthermore the organization of a popular vote, surrounded by administrative and judicial safeguards of impartiality on a very high level of technical perfection, hopelessly struggling against the onslaught of a fifth column which at times became a first column of open saboteurs.

The territory had become, as Miss Wambaugh correctly states (p. 164), "the battlefield . . . of a struggle . . . between two political concepts—democratic liberalism and the authoritarian state." The struggle was lost for democracy before it had really begun, and the question arises whether this was not bound to be so for two reasons. First, the opposing forces were, on the one hand, an abstract concept of law and justice, divorced from any clearly conceived political consideration, and, on the other hand, a political determination which knew its goal and was resolved to reach that goal by all means. Secondly, the theory of international plebiscites starts with the assumption that territorial disputes are isolated causes of war and that by settling peacefully the former, one does away with the latter. Actually, most territorial disputes are only the superficial manifestations of deep-seated aspirations for power, for which the reviewer suggested the term "tensions." International plebiscites will only cure symptoms, not the

disease itself. There is more than one lesson to be learned from the history of the Saar plebiscite.

HANS J. MORGENTHAU

The International Law of John Marshall. By Benjamin Munn Ziegler. Chapel Hill: University of North Carolina Press, 1939. pp. xiv, 386. Index. \$3.50.

Until the appearance of the present book, John Marshall's contributions to the development of international law have received little attention since John Bassett Moore's article almost forty years ago in the *Political Science Quarterly*. The Chief Justice's renown as expounder of the Constitution has been permitted to overshadow his equally established title to veneration as a builder of the modern law of nations; yet Marshall spoke for the Supreme Court in cases involving international questions almost three times as often as in constitutional controversies. Unfortunately there exists no collection of these opinions similar to the well-known anthologies of judicial pronouncements by Mr. Justice Holmes or indeed to that of Marshall's constitutional law opinions by the late Undersecretary of State Joseph P. Cotton (a work nowhere referred to by Ziegler). Many of these cases are simply cited by the author in footnotes; from others there are short quotations illustrative of particular doctrines. It is to be regretted that the author did not have space for a fuller statement of the facts of each case and for lengthier extracts from the language of the court.

It is chiefly, of course, from the Supreme Court decisions in which Marshall participated that his views on international law topics are gleaned by the author and presented analytically under the headings: acquisition of international status and of territory, jurisdiction, nationality and expatriation, consuls, war and its effects on belligerents and neutrals, piracy, the slave trade, extradition, and treaties. Under each heading the author summarizes the law as stated by Grotius, Rutherford, Vattel and other writers relied on in Marshall's day; and then sets forth the American jurist's own exposition of the subject. Not always is the latter marked by originality. The author never tires of pointing out the Chief Justice's indebtedness to the arguments of counsel or to the learning of Story. Similarly reference is made at least thirty times to the "fanatical zeal" with which Marshall followed his "pet theory" of protecting the property rights of individuals.

The author's style is somewhat cumbersome, and peculiar expressions abound. One page, early in the book, furnishes as examples: "perchoice," "a life evaluated in years at eighty," and "the Herculean tasks of a Hague." It should also be noted that, when the rights of neutrals and belligerents conflict, the author's view seems to be that today it is better "to grant more complete rights to the belligerents," since "full rights for neutrals" would "inevitably lead them into war." Marshall's sympathies, on the other hand (like Jefferson's), "were consistently with the neutrals."

EDWARD DUMBAULD

A Diplomatic History of the American People. By Thomas A. Bailey. New York: F. S. Crofts & Co., 1940. pp. xxvi, 806. Index. \$6.00.

This volume deals with the external relations of the American people from colonial times to the outbreak of the European war in 1939. Through skillful arrangement and adroit summaries, the author undertakes to show how foreign policy of the United States has reflected American public opinion and domestic forces. He avoids long excerpts from diplomatic papers, and enlivens his narrative with a wealth of well-selected, short quotations from newspapers, speeches, diaries, biographies, and interviews. The style is effective and the account is a highly readable, balanced one. More than a score of cartoons especially indicative of opinion on questions of foreign policy appear in reproduction, and about an equal number of maps assist toward an understanding of certain diplomatic controversies. There is a condensed but critical bibliographical note at the end of each of the 45 chapters, which guides, in general, to other historical writing. A 32-page index adds materially to the usefulness of the book.

While the author has not given primary attention to legal aspects of his subject, there are, naturally, a considerable number of references to international law. Specialists in the latter field may feel inclined to question implications of such captions as "International Anarchy" and "Modifying International Law Out of Existence" (pp. 615, 616). Some may think unduly defeatist in tone the question, which the author raises, of whether the United States should not have recognized in the World War period that "international law had been torpedoed, gassed and bombed out of existence . . ." (p. 646). Holders of the Anglo-American view of arbitration as essentially adjudication will probably find it difficult to agree with Professor Bailey that arbitrators have a *habit* of "splitting the difference" (pp. 480, 555). In connection with Cuban-American relations of 1868-69, there seems to be a desire to contrast recognition of belligerency with "strict neutrality" (p. 413). But opinions on these matters are quite incidental to the main purposes, namely, of showing what policies were pursued, and illuminating the manner and means of formulation and execution. In these the author has, in the opinion of the reviewer, been generally successful.

ROBERT R. WILSON

Documents on American Foreign Relations, January 1938-June 1939. By S. Shepard Jones and Denys P. Myers. Boston: World Peace Foundation, 1939. pp. xxvi, 582. \$3.75.

This is the first of a series of annual volumes to appear each September, planned to include official papers of the United States "which have given direction to its foreign relations," and in large measure that has been done. Some question, however, might be raised as to the inclusion of "Proposal of a Referendum on War" which did not progress beyond the project stage of the Ludlow Resolution, although it is indisputably convenient to be able to

find the associated material within these covers. The topical arrangement will commend itself to those who prefer logical grouping rather than chronological listing: Principle and Policy (in general); Inter-American Relations; Conflict in the Far East; European Relations; Trade; Finance; Refugees; International Communications; Relations with International Organizations; National Defense; "Neutrality and Peace" Legislation. Thereby a fascinating procession of key actors in the drama of international relations passes before the reader, each carefully identified and labeled, with dates, in a manner superior to the usual practice in collections of documents. Generally full citations are presented, adding to the "full record" value of the book but increasing its cost of publication and hence its price. In the appendix and scattered throughout the book are many valuable tables, such as "Military Missions in Central and South American Countries" (p. 68), "Imports into 16 Trade-Agreement Countries" (p. 371), "International Meetings in Which the United States Government Participated" (p. 471), "Pending Treaties" (p. 475), "Americans Living Abroad" (p. 561), "Quota (and Non-Quota) Immigration Visas Issued" (p. 565), "Categories of Arms, Ammunition, and Implements of War" (with License and Trade Figures) (pp. 573-580), and "Naval Statistics." The story of Mexican expropriations encourages us to believe "that Mexico will know how to honor its obligations" (p. 124), without elucidation of "how"; the feeble Brussels declarations of 1937 (pp. 173-181) disclose stark reality in international restraints, as do the protests to Japan on the bombing of civilian populations in China, with the impressive list of American property so damaged (pp. 205-211), the disregard of foreign rights in the fabrication of the "New Order" in Eastern Asia (pp. 229-266), and the evasive indirect replies of Hitler and Mussolini to President Roosevelt's appeal for peace in April, 1939 (pp. 306-325). The spectacular success of American policy in effecting prompt collection of "apologies from the Japanese Government" (p. 195) and \$2,214,007.36 indemnification (p. 204) for the *Panay* incident, and in the trade agreements program (pp. 334-381), serve to counterbalance less satisfactory results in other directions. The usefulness of future volumes would be enhanced by indices.

WILSON LEON GODSHALL

University Teaching of International Relations. Edited by Sir Alfred Zimmern. New York: Columbia University Press; Paris: International Institute of Intellectual Coöperation, 1939. pp. xvi, 353. Index. \$2.00.

This volume is a record of the 11th session of the International Studies Conference, which was held at Prague, May 23-27, 1938. It contains also some 21 papers by scholars from fourteen countries, in which opinions upon international relations as an academic field and expositions of the teaching of the field in various countries are given; a lengthy extract from the records of the Lwow Conference of 1934 is included with these papers. Problems of the teaching of international relations had engaged the International

Studies Conference in 1930 at Paris, in 1935 at London, and in 1936 at Madrid. Fifty delegates from eighteen member states, among them the United States, Australia, Canada and Chile, participated in the discussions. American scholars who have attended sessions of the American Conference of Teachers of International Law and Related Subjects will be particularly interested in comparing this volume with their own reports, which are referred to by a number of the delegates.

Three large topics engaged the Conference at Prague: (1) the nature and subject-matter of international relations as an academic discipline; (2) methods of teaching international relations; and (3) problems of university administration arising out of the introduction of international relations. Whether international relations is concerned with values; whether it is descriptive only or productive of generalizations; its scope; how it may be organized; whether it has an "angle of vision" differing from that of related social studies; its relation to international law; and when, how, and where it should be taught,—these were the principal subjects of debate. In the very interesting and valuable discussion, the Anglo-American view stands out quite distinctly from the continental, the former disinclined toward the latter's concern with distinctions between "sociological" and normative criteria of a new science of international relations, and favorable to an empirical examination of relevant subject-matter drawn from all available sources and focused upon contemporary international problems. This issue is more than terminological; it involves on the one hand the vital matter of a scholar's capacity for professional treatment of a very broad field of knowledge, and on the other the patent need of synthesis, which must somehow be met. While the record under review impresses more with the difficulties of the problem than with the progress made toward its solution, it encourages the conclusion that under consideration so earnest and so able the problem will be solved.

HAROLD S. QUIGLEY

Japan Among the Great Powers. By Seiji Hishida. New York, London, Toronto: Longmans, Green & Co., 1940. pp. xvi, 405. Index. Map. \$3.50.

This volume, to which John Bassett Moore has written a brief foreword, is a greatly expanded second edition of Dr. Hishida's *The International Position of Japan as a Great Power*, published in 1905. Within the limits imposed by the author's unquestioning acceptance of the official interpretation of his country's policies and actions, the book is a scholarly work in which the diplomatic history of Japan from legendary times to the last decade is recorded concisely and in excellent literary style. While the use of Far Eastern documentary sources is disappointingly meager, our materials are supplemented considerably by references to Japanese secondary works. However, there are no important new revelations to gratify the perennial anticipations of scholars seeking light from the East. The treatment is con-

ventional, omitting analysis of economic and social forces, and confined to a comprehensive account of diplomatic relations. It is a compact, admirably organized chronicle.

Dr. Hishida's concluding chapter, entitled "Japan's Responsibility in East Asia," develops the thesis that world organization involving political intervention in the affairs of the great Powers has been proved a failure, and that regionalism dominated by such Powers is the practicable alternative. The author reiterates frequently the official doctrine that Japan, after long trial first of bilateral settlements of Sino-Japanese difficulties and later of international coöperation, has been compelled, in the interest of the "peace of the Far East," to assume sole responsibility for that desired condition. This policy he believes to be a justifiable counterpart of the regional positions of other Powers. There is much to be said for his argument that "undue intervention" by Western Powers in China has been and would be a menace to Japan. But his refusal to acknowledge the hollowness of Japan's conception of Sino-Japanese "coöperation" is a repetition of the consistent official attitude which has made true coöperation impossible. To write of the "chivalrous spirit in which she is now leading her sister nations of Asia to a higher plane of political, social, and moral responsibility" is to empty honest words of all meaning.

HAROLD S. QUITLEY

L'Entente Baltique. By Bronius Kazlauskas. Paris: Recueil Sirey, 1939. pp. 328. Fr. 60.

Of the post-war regional combinations for collaboration and peace maintenance, only the Baltic and Balkan Ententes possessed at the beginning of 1940 anything more than a theoretical existence, that of the Balkan Entente appearing to hang in the balance. In such circumstances, this groundbreaking study, by a young Lithuanian scholar, of the origins and operation of the Baltic Entente assumes an unusual degree of importance. After a résumé of the background and renaissance of each of the Baltic States, the author traces (pp. 79-120) the rise and fall of the immediate post-war Baltic coöperation movement posited on a defensive union against both Germany and Russia—a movement foredoomed to failure owing to Poland's aggressions against Lithuania which precluded the making of common cause. Kazlauskas then surveys the "lean years" from 1925 to 1934 (pp. 120-136) which saw the formation of the Estonian-Latvian alliance and the conclusion of non-aggression pacts between the individual states and the U.S.S.R. With their relations to the East stabilized, it required only the conclusion of the Polish-German non-aggression pact of January 27, 1934, to show the Baltic States where a principal danger to their basic interests lay. Hence Lithuania, taking the initiative, pushed to conclusion at Geneva, September 12, 1934, the basic treaty of entente.

The achievements of the Entente (pp. 137-188), told with meticulous fidelity on the basis of archival materials made available by the Lithuanian

Legation in Paris, were dual: It established the common front of the Baltic States in matters of general international policy, an attitude which led to common action at Geneva so long as the League seemed viable, in the Non-Intervention Committee at London (really connoting neutrality in an undeclared war), and, during the present hostilities, in formulating and carrying out a common neutrality policy. In intra-Baltic coöperation it went much further, particularly in stimulating various forms of intellectual coöperation and in reaching agreements on matters of private international law. Perhaps the greatest significance of the Entente lay in its transformation of the casual diplomatic coöperation of new-born states into the intimate collaboration of good neighbors, the various branches of government dealing directly with their compeers, despite differences of race, language, religion and régime.

Readers of the JOURNAL will now find of historical interest the texts of the Treaty of Entente, the Baltic Neutrality Regulations, the texts of the Estonian and Lithuanian constitutions, which form appendices, as well as a tragic reminder on the neutrality of the Baltic States. The volume deserves a place in every library that treats of the techniques of international coöperation.

MALBONE W. GRAHAM

Italy and the Vatican at War. By S. William Halperin. Chicago: University of Chicago Press, 1939. pp. xviii, 483. Index. \$3.00.

This title lends itself now to a possible misconception that the author could not have intended. When the book was published in February, 1939, memories of the World War were fading, Italy's war with Abyssinia was long over and the Hitler war had not begun; so that "Italy and the Vatican at War" might then well have connoted merely what the author means, "with each other", although the only physical war concerned is the nine days it took General Cadorna to occupy the States of the Church and the City of Rome, September 11-20, 1870. The work is a minute factual study of the relations between the Kingdom of united Italy and the Papacy for the last eight years of the reign of Pope Pius IX, from the vain effort of Napoleon III to obtain an Austrian and Italian alliance in June, 1870, to the announced death of Pius IX on February 7, 1878. The unweighted facts are presented chronologically in uniformly short, stark sentences, documented with references to Austrian, Belgian, French, German and Italian sources, as bristling with superscript figures as front line wire with barbs, and sometimes nearly as hard to get through. The notes average five to the page and, with wide leading, take up about one-sixth of the space. The absence of a bibliography and a habit of using "*op. cit.*" without any indication of where the work was first referred to and described in full make any desired examination of the sources unduly laborious.

This is the second of a projected series on Italo-Papal relations and, like the

first (*The Separation of Church and State in Italian Thought from Cavour to Mussolini*), displays a cold impartiality and uncriticalness that is so studied as to give the undeserved appearance of a news-gatherer's superficiality. We cannot complain that the author confines himself to his announced term, but we may raise our eyebrows a little when we find he has chosen bounds which require him to present such matters as the occupation of Rome, the unplanned inclusion of the Leonine City, the Law of Guarantees, the undying protests, the self-imprisonment, the threats to depart from Rome, the efforts to keep foreign states away from the Quirinal, the invalidation of the Prussian separation laws and the reaffirmed *non expedit*, without any effort pertinently to relate them to the earlier reduction of the Papal States, the theory of international protection and the first *non expedit* in the political field; the flight to the Jesuits in Gaeta, the dogma of the Immaculate Conception and the doctrine of papal infallibility in the religious realm; or the early recovery from possible epilepsy, the embitterment and reactionism, and the unprecedented jubilee, in the sphere of personal psychology. The bright unshaded bits of a rapidly turning kaleidoscope tend to fatigue our attention. When we realize what helpful concurrent appraisals we might be having, we unwillingly await their appearance in some possible later volume.

GORDON IRELAND

Dictatorship in the Modern World. Revised and enlarged ed. Edited by Guy Stanton Ford. Minneapolis: University of Minnesota Press; London: Humphrey Milford, Oxford University Press, 1939. pp. xiv, 362. Chronology of Dictatorship. \$3.50 (trade ed.); \$2.75 (text ed.).

Fourteen scholars of real distinction and genuine competence have set forth in as many essays, the theory, practice, and technique of dictatorship in the world today. Some of the papers deal with dictatorship within certain definite regions or countries. Others cover the general subject from a special point of view, independently of regional or national considerations. Of the former, Italy, Germany, the Soviet Union, Turkey, the Far East and Latin America provide the basis of discussion. Of the latter, the pattern and means of dictatorship, and its impingement on economics, propaganda, on the interests of women, and on democracy are the topics discussed. The authors are Max Lerner, Henry R. Spencer, Harold C. Deutsch, Hans Kohn, John N. Hazard, Thomas K. Ford, Harold S. Quigley, J. Fred Rippy, Calvin B. Hoover, Peter H. Odegard, Mildred Adams, Sigmund Neumann, Denis W. Brogan, and Joseph R. Staff. Like all works prepared in collaboration, these studies suffer somewhat from a lack of evenness and a continuity of thought and execution which single authorship alone makes possible. On the other hand, some of the essays disclose an individual excellence which is seldom found in one long volume by one author. In this particular case, the superb editing and coördination of material by Guy Stanton Ford has done much to minimize the traditional weaknesses of collaborative works.

Lack of space prevents attention to and criticism of the individual papers. The ones approaching dictatorship from the national or regional standpoint are the most interesting, because they deal with concrete situations, and appear to give the institution of dictatorship flesh and blood. The essays which deal with the pattern and principles of dictatorship are, while less intriguing, certainly more important. Dictatorship, like democracy, cannot be localized, regionalized, or nationalized. That it is a political institution, posited on principles of universal application, and resting for its preservation and growth on a methodology general in its main contours, though differing in detail, is, in a word, the message of this book. The office of this volume has been well discharged. No one interested in the internal and external manifestations of dictatorship can afford to neglect this important theoretical study. To be sure, it begins in each case with the local concerns of the dictator. Yet it always leads from the center to the circumference of state action. In all cases, including the dictatorship, a country's foreign affairs is only a mirror of its domestic institutions.

CHARLES E. MARTIN

Hitler Germany as Seen by a Foreigner. By Cesare Santoro. 3rd English ed., translated from the German, with thirteen diagrams and a supplement: "The New Germany in Pictures." Berlin: Internationaler Verlag, 1939. pp. 488+96.

Hitler's Germany: The Nazi Background to War. By Karl Loewenstein. New York: Macmillan Co., 1939. pp. xvi, 176. \$1.25.

"The object of this book," writes Santoro in the preface to his first German edition, "is to contribute to a better understanding of the new Germany created by Hitler. Hence the author has carefully abstained from putting forward any subjective opinion. . . . It would be folly to remain blind to that nation's good will to live at peace with the world and to contribute to its general well-being" (p. 23). Of his own book, which "reached the publishers on the day when the present European war broke out," Professor Loewenstein notes that the occurrence of war required only an "occasional revision of the tenses," adding that "In fact the government of the Third Reich was a war government from its inception—so much so that the governmental instrumentalities and techniques were designed, to the least detail, to serve ultimately in the conduct of war" (p. vii).

Something of the utter contrast between "official" and "free" opinion can be gathered from the juxtaposed *Leitmotifs* of these two books. In the first, done into English immediately after Munich to serve open propaganda purposes, one finds massive, compendious, studied advocacy, with paeans of praise, scarcely a critical note at any point, and the tedious repetition of statements ranging from dubious interpretations through half-truths on, in the well-known propagandist manner. At best the book acquires a vicarious aura of being semi-official. It is in the main, and particularly as regards international relations topics, authentic in so far as it gives, quite copiously,

official renditions of Hitler speeches or treaty texts. Ironically, as late as June, 1939, it was still canonical to point to Russia as the "mortal enemy" (p. 59) of the Third Reich.

No stigma attaches to the lucid, balanced work of Professor Loewenstein, whose right to authority in this field was well recognized before he left the Third Reich. Privileged to draw upon both official sources and émigré literature, sufficiently withdrawn from the scene to give a composite view without loss of perspective, he gives a succinct picture portraying not only the externals of the Third Reich, but also the inner sources of its power in both domestic and foreign affairs. A final chapter, written after war began, holds it "unlikely that the régime will fall through internal rebellion or revolution," and envisages, *inter alia*, the contingency that "if Hitler wins the war against the West, the ideas of 1789, and with them the light of humanism, will be extinguished in Europe for a long time to come" (p. 175). This pre-computation of international consequences is one to be taken seriously by many Americans who have not hitherto given it much attention.

MALBONE W. GRAHAM

The Quest for Peace Since the World War. By William E. Rappard. Cambridge: Harvard University Press; London: Humphrey Milford, Oxford University Press, 1940. pp. xx, 516. Index. \$4.00.

Seeking the causes of the failure of post-war efforts for peace, the distinguished Swiss statesman and publicist gives us the fruit of profound reflection based on actual participation in many of the events of the period. His study, characterized by remarkably astute critical judgment, should be read by all those who wish to keep their balance in the welter of conflicting opinions which become increasingly baffling now that the passions of war have been unloosed.

The most provocative view expressed by the author concerns the justice of the Treaty of Versailles which, he believes, was in the main respectful of the principle of self-determination. Thus, if the treaty was responsible for the present conflict, it cannot fairly be on account of its inherent injustice. "It is rather because, unsupported by the military coalition which had imposed it upon a weakened Germany, its provisions, after the break-up of that coalition, quite naturally ceased faithfully to reflect the national forces whose relative position it had defined." The author even goes so far as to suggest that if the United States had failed to intervene in Europe in 1917, the peace settlement would doubtless have been far less just, but it might well have been less precarious. Furthermore, the peace settlement might have been both just and lasting had the United States consented to defend the liberal conquests it fought for both in war and at the conference table.

The League of Nations, in Professor Rappard's opinion, was essentially an American contribution; even more, it was the work of a single American. We owe it to President Wilson's faith and power. But the support he ob-

tained for the League was so slight that "what will surprise us will certainly not be the present failure . . . but the fact that it showed so much promise and came so near to succeeding." The creation of the League was an event of first historical magnitude. Unfortunately, the post-war statesmen failed to seize the opportunities it offered for constructing a permanent and peaceful world order.

Examining first the history of twenty years of arbitration, the author shows that during the first ten years it gained a number of notable successes, but after the machinery had been perfected, repeated failures taught the lesson that arbitration is a medicament, not a panacea. The judge alone is not enough, but "a policeman competent and able both to bring to the bar all recalcitrants, no matter how powerful and unruly, and to oblige them to respect the findings of the judge, whether they agree with them or not." Here, as elsewhere in the field of international relations, the dogma of national sovereignty was the major obstacle.

Tracing then the rise and fall of collective security, the author maintains that the abstention of the United States caused the League guarantees to lose much of their value, and very appreciably aggravated the burden of those who feared they might be called on as guarantors. The crucial test of the system, the Italo-Ethiopian conflict, was disastrous, especially as it heralded all over the world the tragic news of the complete disintegration of international solidarity. In this matter England comes in for particularly severe censure in which "the folly of former caution and the wisdom of former boldness" are emphasized.

Then follows an analysis of the "tragedy of disarmament," both a cause and an effect of the failure of collective security. While it was true that France and her allies were constantly thwarting the efforts of Germany, supported mainly by Italy and by the U.S.S.R., at the same time the professed friends of disarmament were precisely those who turned out to be the most dangerous aggressors. Thus, as we look back from the perspective of 1940, it is difficult to blame France, Czechoslovakia and Poland for the extreme caution they showed for over ten years after the World War in the matter of disarmament. Even more, it is regrettable that the victims of aggression were not better armed for defense. The real cause for failure, the author concludes, was the absence of a real international community.

Admitting that the great experiment has ended in dismal failure, nevertheless the author closes with a note of hope, although expressly abstaining from offering any easy formula or suggesting some utopia for permanent peace. He does, however, underline the errors committed both at Versailles and since, hoping, but without great conviction, that they will not be repeated. His final word is:

The bold conquests of freedom in 1919 called for a strong League of Nations to protect, consolidate and extend them. Let the statesmen of the future, inspired by the idealism of the World War and undismayed

by the terrible reactions of its aftermath, seek first to achieve what had been achieved and then to defend what had been abandoned!

JOHN B. WHITTON

The English Navigation Laws. By Lawrence A. Harper. New York: Columbia University Press, 1939. pp. xvi, 503. Index. \$3.75.

Apart from questions of peace and war, perhaps the outstanding problem in our generation is the reconciliation of administrative government with personal liberty. Therefore, man's earlier experiments in social engineering and planning are of significance in seeking to understand the means by which various economic and political goals may be attained. The author of the above volume is a lawyer who has turned historian and who in his work exemplifies the highest qualities of both professions. His book is a most scholarly, illuminating, and entertaining study of the British 17th-century technique, through the Navigation Acts under the mercantile system of that day, employed in achieving maritime power.

After tracing the origin of the laws leading up to the Navigation Act of 1660, which for the first time evolved a workable rule, the author examines in detail the enforcement of the statute in England and the Colonies, and then, in a series of penetrating chapters, he weighs the evidence and discusses the results. The author's investigations were begun as long ago as 1925 and the major part of his preliminary work was done from original sources found chiefly in the Public Record Office and the British Museum, where many leads came from the Calendars of State Papers Domestic, State Papers Colonial, Treasury Books, Treasury Papers, and the Calendars of State Papers Foreign.

Little regarding the operation of the Navigation Acts could be gleaned from judicial decisions, fewer than ten of which, involving offenses against the laws of trade, were included in reports published prior to 1770. The law at the waterside, as administered by the numerous officers of the government, was what counted. It is here, in describing the methods of enforcement both in England and the Colonies, that the author is at his very best. Nor does he neglect the human factor involved in enforcement, such as the dispensations granted by the Crown, the winking at trivial breaches of law by the practical representatives of the Treasury, the public complacency where the "honest smuggler" was concerned, etc. One of the most entertaining chapters relates to the administration of the Acts in the colonial courts, particularly in America, where, for example, Sir Henry Morgan, turned conservative after his salad days on the Spanish Main, concerned himself as Judge Admiral in Jamaica with applying the trade laws against the shippers of that isle.

The author concludes that the Navigation Acts, judged with relation to the end they were designed to accomplish, were successful in achieving supremacy for English maritime commerce. What the volume of trade might

have been in the absence of legislative restraint cannot be measured, but the evidence indicates clearly that by virtue of the Acts the commerce of England gained in relation to the volume of her rivals. As the author says, the British statesmen of that day were not deluded by mercantile fallacies or free-trade arguments; "their views represented stern reality in an age of international strife."

HENRY S. FRASER

The Essentials of Japanese Constitutional Law. By Shinichi Fujii. Tokyo: Yuhikaku, 1940. pp. xvi, 463. Index. \$5.00.

A preface by Count Kentaro Kaneko, one of the assistants of Prince Ito in the drafting of the Constitution of 1889, commends the study of Professor Fujii as a correct interpretation of the fundamental law of Japan. The author is a member of the faculty of Waseda University, which at one time, under the influence of Count Okuma, was a great progressive seat of learning. In recent years the university has submitted almost completely to official dictation. Accordingly, the reader may suspect that the volume of Professor Fujii will reflect the reactionary tendencies of the alliance of militarists, bureaucrats and munition-makers who now dominate the government of Nippon. This assumption is found to be all too true. The author, although a political scientist, accepts without question the myth that the Empire of Japan is founded on divine will, that the Japanese state was created about 1,800,000 years ago by the Sun Goddess Amaterasu-o-Mikami (whose existence by scientists is considered a myth), that the Imperial dynasty has never been broken in lineage, that loyalty of Japanese subjects includes Emperor-worship, and that sovereignty is vested in the Emperor himself.

No mention is made of the views of Professor Tatsukichi Minobe, the most distinguished living constitutional jurist in Japan. For nearly twenty years his constitutional views prevailed in the Imperial University of Tokyo. In his famous *Kempo Seigi*, or Commentaries on the Constitution, he expounded the theory that the Emperor is only an organ of the state rather than being the essence of the state. In 1935, the reactionary movement in Japan led to the prosecution of Professor Minobe, to his withdrawal from the House of Peers and to the placing of an official ban on his books. While the Emperor-organ theory is no longer tenable in Japan, a scientific treatise on the Japanese Constitution should at least mention it if for no other than historical reasons.

Professor Fujii's book is written exclusively for Western readers, and is somewhat an improvement upon a similar work by Professor Matsunami which appeared in 1930. The value of both books consists in the fact that they are the only recent treatises on the Japanese Constitution written in English. Professor Fujii's commentary chiefly follows the *Kempo Teiyo*, or Principles of Constitutional Law published by Yatsuka Hozumi in 1910. Yet the author makes no reference to Professor Hozumi. Other great

jurists, like Ichimura, Sasaki, Oda, Shimizu and Uyesugi, differ on various aspects of the constitutional law. Nevertheless, the author pronounces one Japanese view on each section of the Constitution without reference to the great Japanese jurists, although he burdens his text with numerous references to the political philosophy of British, French, American and German writers.

KENNETH COLEGROVE

BRIEFER NOTICES

Tratado de Derecho Internacional Privado. 2d. ed. By Alfredo Cook A. (Medellin, Colombia: Tipografia Sanson, 1940. pp. 275.) This work, now published in rather more compact form, is a second edition of the original book published in 1935 and reviewed by this JOURNAL (Vol. 30, p. 577). The author has recast the former publication and brought it up to date in all respects. It is particularly noticeable for the attention it gives to the position of the foreigner in ancient times, during the Middle Ages, and among modern nations. The author devotes himself especially to the private international law of the civil law countries, and the text with the appendices enables one to appreciate the present-day position of the foreigner in all respects in Colombia.

JACKSON H. RALSTON

Survey of International Arbitrations, 1794-1938. By A. M. Stuyt. (The Hague: Martinus Nijhoff, 1939. pp. xii, 479. Index. Gld. 20.) This conspectus of arbitrations lists for 409 cases the parties, the texts of the terms of reference, the arbitrators, data as to the instruments of reference, and information as to the awards and their execution. Full bibliographic citations of the documents are given. The form is tabular, and so convenient that in an hour the reviewer checked the 409 cases to find that the "law to be applied" was recorded in 165 instances and a notation on the "performance" of the award in 205. As a compendium of terms of reference, the book is replete for the student; the other details are convenient for reference, and their handy presentation may well encourage comparative study of technical aspects of arbitration. If so, the book will justify itself beyond its utility as a reference work. In the appendix, 24 arbitrations under the universal postal conventions are listed for the first time. Some dozen instances of the use of the commission of inquiry or conciliation, one sample of the committee of jurists used by the League of Nations and a mere smattering of the Central American Court of Justice are also appended. Mr. Stuyt cites W. Evans Darby's *Modern Pacific Settlements*, but apparently used it but little. Darby lists 540 cases of pacific settlement from 1794 to 1904 against Stuyt's 409 arbitrations from 1789 to 1938. The difference is not due to Stuyt's strict definition of arbitration nor his unit notices of claims commissions, but rather to his confining his inclusions to cases for which he could cite documents. Darby cites lots of *compromis* and awards he could have used, as well as facts that would fill present *lacunae* in the tabulated matter. Though Mr. Stuyt does "not make any claim to completeness" (p. viii), his work has been found entirely accurate. So far, so good. Is there a candidate to make a definitive list of arbitrations?

DENYS P. MYERS

Self-Determination, 1919. A Study in Frontier-Making between Germany and Poland. By Frederick W. Kaltenbach. (London: Jarrolds, 1938. pp. 150. Index, Appendix, and Bibliography. 3s. 6d.) This short study,

written before Hitler invaded Poland, presents exclusively the German thesis regarding the Polish "Corridor," and, indeed, all of the other new German frontiers under the Treaty of Versailles. Prussian rule over the Slav peasants in Posen is called "benevolent," and while the appendix consists of Polish propaganda in the Silesian plebiscite, no mention is made of the German propaganda. Also, it is somewhat startling to find that, disregarding the plebiscites of the French Revolution and the 19th century, the first formulation of the principle is credited to Renan in 1882. Similarly, the references to the plebiscites under the Versailles Treaty show only a sketchy acquaintance with their history. The author does a service, however, in emphasizing the fact that language statistics are not reliable as evidence of national sentiment, and refers, properly, to the results of the plebiscites in Allenstein, Upper Silesia, and Carinthia as proof. This evidence was not yet available when the Allied experts, relying on the German language statistics, and the vote in the "Corridor" for Polish representatives to the Reichstag, reached the conviction that a restored Poland would evoke an even stronger Polish sentiment. One could wish that there had been a plebiscite in the "Corridor" in 1920, although Mr. Kaltenbach sees no excuse for any Polish claim to the area. One could wish also that Hitler had allowed a free vote there, under international auspices, and in Austria, the Sudeten region, Danzig, and Posen, as well. We have no more evidence that these areas wish to be under Germany than that the "Corridor" wanted to be part of Poland.

SARAH WAMBAUGH

Diritto Marittimo di Guerra. By Roberto Sandiford. 6th ed. (Rome: Tipo-Litografia dell'Ufficio di Gabinetto, Ministero della Marina, 1940. pp. x, 372. Index. L. 20.) This volume is a revision of the work the fifth edition of which was reviewed in this JOURNAL last year (Vol. 33, p. 223). In addition to minor changes in style and arrangement, there is more extended treatment of some aspects of visit and search, treatment of prizes, navicerts, and the American neutrality legislation. References are given to the instructions of the Italian Minister of the Marine of October 18, 1938 (p. 265 ff.). Among the recent events mentioned is the Declaration of Panama. The author points out that the zone set up by the Declaration must be accepted by the belligerents to have any validity (p. 293). The footnotes and the bibliography have been enlarged by references to works which appeared after the preceding edition, but are far from exhaustive.

OLIVER J. LISSITZYN

Rights of Performers in Broadcasting, Television and the Mechanical Reproduction of Sounds. Agenda, 26th Sess. (Geneva: International Labor Office, 1939. pp. iv, 128.) This report discusses the legal trends toward protecting performers as considered by the Governing Body of the International Labor Office. The discussion comprises the four following chapters: Historical Survey, Existing Regulations, Record of the Meeting of the Committee of Experts, and Conclusions and Commentary on the Questionnaire sent out by the Labor Office to elicit replies to permit the preparation of a draft of an international convention. The method of presentation covers both the national and international fields. "Performers' rights" is used to describe the rights of interpretative artists to remuneration. The importance of these rights has been enhanced by the extraordinary transformations effected by phonographic recording and radio. The phonograph rendered a performance permanent and tangible. The radio extended it to a world

audience. The paradoxical result was a phenomenal increase in artistic entertainment, combined with unprecedented unemployment among performers. Chapter II, on Existing Regulations, summarizes the national law and practice in eighteen countries, and comments on collective agreements. The divergent tendencies of national legislation and the international character of the broadcasting and recording industries resulted in the conclusion that an international labor convention might afford the most feasible solution. The study is preliminary in character and of special interest to experts in these arts and to the student of comparative law.

HOWARD S. LEROY

The Agadir Crisis. By Ima Christina Barlow. (Chapel Hill: University of North Carolina Press, 1940. pp. x, 422. Index. \$4.00.) Machiavelli contributed a great deal toward the better understanding of world politics. In this definitive, historical account of the Agadir crisis we can see how Machiavelli's distinction between private and public morality still operates in the great game that is modern diplomacy. We can see how responsible statesmen like Kiderlen, Cambon, Lloyd George, Caillaux, Grey, Bethmann-Hollweg *et al.*,—encouraged by imperialistic, nationalistic and capitalistic interests—dared to flirt with Mars and gamble with millions of lives in order to win a diplomatic pot containing little besides national prestige. We can see how irrational diplomacy sometimes is. Professor Barlow begins her scholarly, heavily documented work by pointing out the economic and strategic importance of Morocco—one of the last plums in the garden of imperialism. She explains the origins of French control over the region, and escorts the reader through the diplomatic implications of the Algeiras Conference and the Franco-German agreement of 1909. From a stirring account of the intrigues of the Mannesman Brothers in Morocco, she turns to the occupation of Fez by the French and the coming of the German warship *Panther* to the closed port of Agadir. Then followed months of tension and anxiety; months of bickering and bargaining with Europe on the brink of war. The author skilfully takes us step by step through the maze of demands and counter-demands to the Franco-German Treaty of 1911. But, she declares, the "fruit of this agony was not worth the bother." France gained Morocco, but she could have had it anyway. Germany secured "a few acres of undeveloped tropical land infested with the dread sleeping sickness." Here, surely, was an example of much diplomatic ado about nothing. The author, in exploiting numerous documents and primary materials, has done a painstaking job. The result is a valuable and interesting contribution to the study of European diplomacy in the pre-war era.

FRANCIS O. WILCOX

Prologue to War. By Elizabeth Wiskemann. (New York and Toronto: Oxford University Press, 1940. pp. x, 332. Index. \$3.00.) This is the American printing of a book which first appeared in London at the end of last year under the title *Undeclared War*, published by Constable and Co., Ltd. The original title was perhaps more accurately descriptive than the American. *Prologue to War* is the story of the impact of Nazi Germany upon the smaller countries to the east and west of the Rome-Berlin axis. Miss Wiskemann had earlier demonstrated in her scholarly study of the Czechoslovakian problem (*Czechs and Germans*, London: Oxford University Press, 1938) her competence to write on the intricate problems of eastern Europe. In the book under review, covering a wider field and written in a more

popular style, with documentation largely omitted, she deals with other lands and peoples that in the summer of 1939 were the subjects of Nazi attention. The first part—roughly four-fifths of the book—is devoted to the countries to the east of the axis, especially Hungary, Rumania, Yugoslavia and Poland. The author marshals abundant facts to show how the Nazis have been able to exploit minority aspirations, economic difficulties, social discontent and political divisions in these countries to their own advantage. She also shows how supremely clever the Nazis have been in dividing their intended victims, in playing one against the other, with the view to ultimately subjecting all of them. By contrast the picture that Miss Wiskemann portrays of the ability of the Swiss to resist the Nazi pressure is encouraging, though events that have taken place since she wrote make it doubtful whether even the sturdy Swiss democracy can withstand the immediate Nazi impact. Miss Wiskemann's book is an important contribution to the understanding of Nazi objectives and techniques quite apart from the help it gives to the understanding of conditions in the countries covered. It should help to complete the education of those who read *Mein Kampf* and yet were not willing to believe.

LELAND M. GOODRICH

The Way Out of War. By César Saerchinger. (New York: Macmillan Co., 1940. pp. ii, 125. Maps by Emil Herlin. 60¢.) Formerly a correspondent of American newspapers and associated with trans-Atlantic radio service, broadcaster today of "The Story behind the Headlines" for the American Historical Association, César Saerchinger devotes here thirteen brief chapters to the way out of war. It is an honest and intelligent piece of work. He finds that leaders have tumbled their nations into war because their social and political skills have not caught up with the miracles that physical science has wrought. Well furnished with historical backgrounds, the author shows how nationalism, industrialism, and imperialism have led to wars and frustrated, as at Paris in the winter of 1918-19, the will to establish peace. He finds the present war due to something more than mad leaders and wicked nations, however, something having to do with deep economic and social forces apparently too difficult for one generation to deal with; but that war, which may have solved problems in the past, is now sure to create more problems than it solves. He favors the federation of European states, "a peace with justice in a coöperative world." He pleads that we do our best to understand the true issues of the present conflict and to switch our hatreds for persons and nations to a more reasonable condemnation of war itself. An economic union through economic coöperation must come first, with political union as a later goal. He looks to leadership from America to solve the second part of the problem—the final elimination of war.

ARTHUR DEERIN CALL

Symposium on the Totalitarian State. Proceedings of the American Philosophical Society, Nov. 17, 1939. Vol. 82, No. 1. (Philadelphia: American Philosophical Society, 1940. pp. ii, 102. \$.75.) This symposium, to which seven different scholars contributed, affords a useful and thought-provoking survey of totalitarianism from the points of view of politics, education, the philosophy of war, economics, international trade and finance, and history, respectively. In general, there is stress throughout upon the anti-rationalism and anti-universalism of totalitarianism and upon its character as a "secular religion." As Professor Hans Kohn strikingly puts it, "idle dreams' of universal truth and justice disappear in the dust heap of bookish-

ness . . ." and "two enemies facing each other are not united any more by a moral or intellectual community above the battle fields" (pp. 59, 60). The reviewer has noted but one direct reference to international law—a mention of efforts of National Socialist science to arrive at a theory of the law (p. 68 n.). Professor Fritz Morstein Marx, in his discussion of totalitarian politics, has touched upon the possibility of an international community and of new international standards under conditions of totalitarianism (pp. 4, 37).

ROBERT R. WILSON

W. I. Jennings, in *A Federation for Western Europe* (New York: Macmillan Co.; Cambridge, Eng.: University Press, 1940. pp. xii, 208. Index. \$2.50), presents for criticism the rough draft of a constitution for such a federation, together with a detailed explanation and exposition of its provisions. The author has served as a consultant and constitutional expert in connection with the research of the organization "Federal Union," which is the English counterpart of the American "Interdemocracy Federal Unionists" organized following the publication of Clarence Streit's *Union Now*. The constitution drafted, and its exposition, however, represent the author's personal analysis and conclusions rather than those of the organization. There are a number of assumptions which underlie the analysis and determine the conclusions. The first is that the long-run choice is between federal organization for western Europe and regularly recurrent war. The second is that federal union is practicable for the western European states but not for the world. The third is that it must be restricted to democratic states. The fourth is that the present war is going to be won by England and France and that it will result in the establishment of a democratic régime in Germany so that Germany may and must be included in the western European federation. The alternative, which the author rightly concludes would not establish a permanent basis of peace, he finds to be the division of Germany into a number of small states. On the basis of these assumptions, which are themselves carefully examined, except the last one, Professor Jennings develops his analysis of the problems presented in the proposal for federal union, his proposals for their solution and the argument for and against the several propositions embodied in his constitutional draft. The purposes of federation are presented in the first chapter. The reasons why it must be democratic and initially restricted to the states of Western Europe are given in the second chapter. The third and fourth chapters are concerned with the problems presented because Britain is the center of the Commonwealth as well as a European state, and with those resulting from the possession of colonies by some of the states concerned. The following six chapters take up the problems of organization and functions of the federation. A concluding chapter poses the question of the practicability of federation itself and of the scheme presented, and invites criticism of it. The author writes concretely, honestly, and thoroughly competently. The volume is challenging to the political scientist and provocative of thought. The reviewer can only express the hope that it will be widely read and the plan presented be subjected to the detailed criticism that the author invites, to the end that it either find acceptance or be so improved as to bring about its acceptance.

HAROLD M. VINACKE

The American Entente. By R. B. Mowat. (London: Edward Arnold & Co., 1939. pp. 286. Index. \$2.50.) This book may be characterized as an amiable one. It is written by a Britisher, who likes America, to further

better understanding between the peoples of the United States and Great Britain. The author avows his purpose "to investigate and to illustrate an historical fact—the connection and amount of co-ordination, co-operation, or 'non-co-operation' between the British and the Americans since 1783." This he has done faithfully and with candor, recalling to mind the main and controlling incidents and factors in the relations between the two countries. He has tried conscientiously to be fair, though his narration is necessarily colored by his anxiety to demonstrate a real and a continuing community of interest between the British and American peoples. It would be highly distasteful and disagreeable at a time of such agony for the British Empire to attempt to point out where the author has been uncritical and indiscriminating in his estimate of the incidents and factors affecting the relations of the United States and Great Britain. The chapter on the "Irish Question" and the portion of the chapter on "British and American Peoples" dealing with the war debt are frank and interesting. Concerning the latter unpleasant topic he says: "The inter-state debts have had an unfortunate history, showing a rather low degree of economic intelligence on the part of the politicians, and a meagre sense of obligation on the part of debtors. The American people come best out of any investigation. After a year or two of complete cessation of payments they seem almost to have forgotten the debt altogether." (p. 235.)

PHILIP MARSHALL BROWN

The Background of European Governments. By Norman L. Hill and Harold W. Stoke. 2d ed. (New York: Farrar & Rinehart, 1940. pp. xx, 672. Index. \$2.75.) This is a second, revised and enlarged edition of a book first published in 1935. The description, "Readings and materials on the organization and operation of the major governments of Europe," which appears on the title page is much more accurate than the title. For the volume deals, not with the governments of Europe, but with only five of them: Great Britain, France, Germany, Italy and Russia; and it consists in the main of selections from previously published material. These selections have been skillfully made and arranged and they are knit together by introductory and explanatory paragraphs so that the section on each country gives a satisfactory and interesting description of its political institutions. Nearly three quarters of the selections in the second edition are new. An effort has been made to deal with contemporary affairs, but happily the main emphasis has been placed on the basic and permanent aspects of the political systems. A section of some 25 pages has been added tracing the outbreak of the war and the emergency acts which have resulted from the hostilities. This is a useful book not only for students of politics but for the average citizen who wants to know how the important European governments are constituted and how they function.

WALTER H. MALLORY

European Governments and Politics. By Frederic Austin Ogg. 2d ed. (New York: Macmillan Co., 1939. pp. viii, 936. Index. \$4.25.) When the first edition of this work made its appearance some six years ago, the present reviewer noted in this JOURNAL (January, 1935) that the account given of the five governments of Great Britain, France, Germany, Italy and the Union of Soviet Socialist Republics showed a fine ability on the part of Professor Ogg to discern and describe the features that most needed to be explained and emphasized. It was also noted that only the Government of Great Britain was dealt with at considerable length, and that the accounts of the Governments of Italy and Russia were brief in the extreme. In this

second edition of the work the same governments are described with about the same proportions of space allotted to them. However, it is clear that Professor Ogg has sought to note such governmental changes and developments as have taken place during the years since 1934, and thus to bring his text to date. It is, of course, with special reference to conditions in Germany that revision has been demanded, for, when Professor Ogg first wrote, Hitler had just established himself as dictator, and the future of National Socialism was highly uncertain. The revision undertaken in this later edition takes largely the form of a fuller explanation of why the Nazis were able to overcome the Weimar Republic, and the addition of excellent chapters dealing with National Socialist ideas, organization and techniques, and, in general, with Germany's totalitarian state. It is apparent from his bibliographical notes that Professor Ogg has kept thoroughly abreast of the literature of his subject. In format and presswork the volume is all that can be asked of a high-type textbook.

W. W. WILLOUGHBY

The Protection of American Export Trade. By Francis B. Sayre. (Green Foundation Lectures, Westminster College, Missouri, 1939. Chicago: University of Chicago Press, 1940. pp. xii, 93. \$1.50.) This is a crystal-clear and compact treatment of the foreign trade problem from the viewpoint of one who has played an important part in New Deal commercial diplomacy. It traces the growth of protectionism in the United States, the foreign trade debacle following 1929, and the effort to protect exports through trade agreements. Moderation of tariffs and equality of treatment extended to all nations, except those that discriminate against the United States, are set forth as principles likely to advance American as well as world interests. The book is a stimulant for anyone who would attempt to fathom the commercial implications of American industrial and financial power.

BENJAMIN H. WILLIAMS

Essays in Pan Americanism. By Joseph Byrne Lockey. (Berkeley: University of California Press, 1939. pp. viii, 174. \$2.00.) Twenty years ago the author of this volume published a volume on the beginnings of Pan Americanism which determined his continued interest in the development of relations between the states of the New World. The present volume of nine essays relating to the subject of inter-American peace and unity is of timely interest. It is published coincident with European dissension with a purpose to contribute assistance toward an understanding of past failures and successes in inter-American diplomacy and toward future improvement of friendly relations. It consists of articles previously printed elsewhere, chiefly in periodicals of learned societies (two in Bemis' *Secretaries of State and their Diplomacy*). Among the scattered subjects which it treats are the meaning of Pan Americanism and its relation to economic imperialism, the policies of Blaine, William Shaler's extraordinary Pan Americanism scheme of 1812, Toledo's Florida intrigues of 1811-16 and 1819, diplomatic futility of early American relations with Central America (1824-49), and the origin of the Isthmian diplomacy of 1846. The narrative under each subject is supplied with bibliographical notes. The author states that the American state system of Pan Americanism rests upon seven foundations: independence from Europe, state representative government, territorial integrity, law, non-intervention, equality, and coöperation.

J. M. CALLAHAN

Handbook of Latin American Studies: 1938. A Selective Guide to the Material Published in 1938 on Anthropology, Archives, Art, Economics, Education, Folklore, Geography, Government, History, International Relations, Law, Language and Literature, and Libraries. Edited for the Committee on Latin American Studies of the Council of Learned Societies by Lewis Hanke and Raul D'Eca. (Cambridge: Harvard University Press, 1939. pp. xvi, 468. Index.) The full title of this *Handbook* sufficiently indicates its character and scope. The section on International Relations, edited as in former issues by J. Fred Rippy, contains an innovation in the separate listing of treaties, conventions, international acts, protocols, and agreements approved or denounced by Latin American countries in 1938. This list, prepared by William Sanders of the Pan American Union, is based on official documents in all cases except a few in which it was necessary to rely on private publications. The bilateral agreements, 86 in number, are listed by countries arranged alphabetically. The nature of the agreement, the date of signature, the date of promulgation, and the publication in which the text may be found are indicated. The multilateral conventions, of which there are 38, are more concisely described. The section on Law also retains its editor of former issues, John T. Vance. It is prefaced by an enlightening little essay in which Mr. Vance calls attention to significant trends as illustrated in a number of important works in the various branches of the subject, including international law. The *Handbook* ought to be consulted by all who desire to keep abreast of the intellectual output in the Latin American Republics.

J. B. LOCKEY

Indian States and Responsible Government. By K. R. R. Sastry. (Allahabad University, India: 1939. pp. 142. 7s. 6d.) This small volume has seven chapters, a preface, a bibliography, throughout which the author appeals for the establishment of responsible government. There are more than 550 Protected States and Jagirs under the control of the India Office in London, administered through the Viceroy Office, or by the Governors of Bombay, Madras and other defined areas of local government. The author, apparently, is not pleased with the rights often reserved to Feudatory Princes by treaties made years ago with the old East India Company, apparently thinking that the area of control of the paramount power should be restricted to what he describes as "its proper field of action." Concern is also expressed with certain areas of government which do not, in his opinion, move with the times, while he lists ten states which have impressed him with their constitutional progress. In spite of this admission (p. 49), he returns (p. 138) to his regrets that "in a world where International Law is under eclipse, 562-odd Protected States and Jagirs persist in India, owing to the might of the Paramount Power." All this is remarkable when modern India boasts of only 3.6 millions of inhabitants that can speak English out of 358 millions of people; out of which 358 millions, only 9.49 are out of the illiterate stage. How these illiterates will vote or express their views is not explained. Such facts the author passes over in silence, nor does he seem to keep before his eyes the fact that the greatest gift to his people, no matter what race or state or style of government they may be or possess, is to be found in the presence of a power which by virtue of its controlling position can afford to be, and is, impartial in distributing protection and legal justice. The varying shades of suppressed bitterness harm the presentation of his case and will tend to hold back consent to his suggested methods of greater legislative and political freedom. The responsibility of handing over 358

millions of people to the tender mercies of political pundits who are largely without experience of parliamentary or administrative procedure is too great in the disturbed condition of the world today. BOYD-CARPENTER

La Protection des Collections Nationales d'Art et d'Histoire. (Paris: Office International des Musées, 1939. pp. 118.) This is the first pamphlet of the series, "*Art et Archéologie*," *Recueil de Législation Comparée et de Droit International*, the publication of which has been undertaken by the Office International des Musées, forming part of the International Institute of Intellectual Coöperation. Museums are not only depositories of the culture of each country. They are veritable institutions of intellectual coöperation in the international field. The Office International sought since its creation in 1926 to coördinate the activities of museums throughout the world. It communicated to the various countries resolutions constituting "agreements in principle" adopted by experts for the guidance of national legislators. It helped the conclusion of administrative agreements between two or more national administrations. Lastly, it has proposed international conventions constituting international regulation. The present pamphlet includes an introduction by M. Foundoukidis, Secretary General of the Office International des Musées, and a discussion by Judge Charles de Visser, of the World Court, on the necessity of an international regulation for the protection of national historic and artistic works. There follow the first draft of the convention in 1933 with the observations made by the various governments, the second draft of 1936, and the definitive draft of 1939 accompanied by a commentary of its articles. The object of the convention is to facilitate by international mutual assistance the restitution of objects abstracted from national collections. STEPHEN P. LADAS

Studi di Diritto Internazionale. Diretti da Roberto Ago e Giorgio Balladore Pallieri. Milan: A. Giuffrè, 1939.

No. 1: *Le Navi Private nel Diritto Internazionale.* By Rolando Quadri. pp. viii, 167. L. 30.

No. 2: *Il Protettorato Internazionale.* By Giancarlo Venturini. pp. 156. L. 30.

No. 3: *Aspetti Giuridici del Sangiaccato di Alessandretta.* By Giuseppe Sperduti. pp. xii, 368. L. 55.

Under the eminent direction of Professors Ago and Balladore Pallieri a new series of monographs on problems of international law has been started. The first three volumes show all the virtues of the Italian school of international law: strictly juridical method of approach; clear distinction between international law and international politics; systematic, theoretical treatment; use of the whole relevant literature in the great languages; but they combine with these virtues—a combination this reviewer has always advocated—the advantages of the Anglo-American school: thorough use of the diplomatic practice of states and of all relevant "cases."

The monograph by Quadri deals with the important problem of the legal situation of private ships in international law in time of peace. The term "private ships" designates here all ships, whether private property or state-owned, which are not dedicated to the exercise of the state's power. The author's task is a dogmatic and uniform construction of this problem, to look for the foundation of the jurisdiction of the state of the flag over private ships. Rejecting the dogmatic fiction of the ship as "a floating part of territory," he refutes also the doctrines which would found the jurisdiction

of the state of the flag either in territorial or personal sovereignty. According to the author, the foundation is the "governing power" (*potestà di governo*) over all the elements of the ship's community, including alien members of the crew or passengers. This jurisdiction is exclusive in *terra nullius*, i.e., on the high seas. As to private ships in foreign territorial waters, the author rejects the theory of the exclusive jurisdiction of the coastal state, from which certain exercises of the jurisdiction of the state of the flag are only exceptions admitted by the coastal state. The state of the flag has also, if the ship is in foreign territorial waters, jurisdiction over all the elements of the ship's community, except that here its jurisdiction is not exclusive but concurrent with that of the coastal state. And the relations between these two concurrent jurisdictions are ruled by the norm, that manifestations of the foreign naval community which are not connected with the life of the territorial community are exempt, whereas in the case of facts which transcend the board of the foreign ship, facts which cannot be isolated from the life of the territorial community, the coastal state has a concurrent jurisdiction.

Venturini studies the essential elements common to all concrete cases of international protectorates. He analyzes the juridical situation of the protected state, and states correctly that the sovereignty of the protected state and the international character of its legal relations with the protector are essential elements. Studying the juridical situation of the protector, he correctly states that protection against internal dangers and interference in the internal affairs of the protected state are not essential elements; the only essential element is the protector's interference in the foreign affairs of the protected state, an interference which can take either the form of fully representing the protected state in its international relations so that the latter, while a person in international law, completely lacks capacity to act, or of a mere supervision, by approval or veto, of the foreign relations of the protected state whereby the latter has a limited capacity to act. With all that this reviewer fully agrees. But the new theories of the author are not convincing to this reviewer. According to them the legal foundation of a protectorate is not in the treaty of protectorate, but in a situation of fact, according to the rule of effectivity, so that the existence of a protectorate and its legality are two separate problems, which would permit a protectorate to come into existence without treaty; further that this situation of fact has a validity *erga omnes*, independent from the recognition of the protectorate by third states; finally, the inclusion of the situation of Danzig in regard to Poland under the Treaty of Versailles, and the inclusion of the A mandates in the category of protectorates.

Sperduti gives a detailed legal analysis of the problem of the Sanjak of Alexandretta. He studies thoroughly the Franco-Turkish accord of 1921, the San Remo accord of 1920, the charter of the Syrian mandate of 1922, the Franco-Turkish conflict before the League of Nations in 1936, the new régime of Alexandretta, set up in 1937, and the Franco-Turkish accord of June 23, 1939, by which France ceded this region to Turkey. He concludes that the last-named treaty is void and illegal in regard to Syria, the League of Nations and the San Remo Powers, because its conclusion exceeded the international competence of France, whose jurisdiction with regard to Syria is not that of a sovereign, but only of a Mandatory Power, obligated by the charter of the Syria Mandate to secure the territorial integrity of Syria; all the more so as this accord was not concluded for Syria's benefit, but for France's benefit, which, as the treaty itself recognizes, paid

this price in order to gain the mutual assistance pact with Turkey, contained in the same accord. And, indeed, the international lawyer cannot escape the conclusion that France transcended her competence as Mandatory Power. It is curious to see that the arguments which speak now against France are exactly the arguments which France herself carefully and in detail put forward when she rejected in 1936 the demand of Turkey to set up the region of Alexandretta as an independent state.

JOSEPH L. KUNZ

BOOKS RECEIVED *

- Allard, Paul. *Le Quai-D'Orsay. Son Personnel—Ses Rouages—Ses Dessous*. Paris: Les Éditions de France, 1938. pp. xii, 234. Fr. 18.
- American Society of Composers, Authors and Publishers. *Second Copyright Law Symposium*. New York: 1940. pp. 167.
- Berkol, Faruk N. *Le Statut Juridique Actuel des Portes Maritimes Orientales de la Méditerranée (Les Détroits—Le Canal de Suez)*. Paris: Recueil Sirey, 1940. pp. 496. Fr. 80.
- Bigant, A. *La Nationalisation et le Contrôle des Usines de Guerre*. (2nd ed.) Paris: Éditions Domat-Montchrestien, 1939. pp. ii, 231. Fr. 40.
- Bingham, Alfred M. *The United States of Europe*. (2nd printing.) New York: Duell, Sloan & Pearce, 1940. pp. x, 334. Index. \$2.50.
- Boggs, S. Whittemore. *International Boundaries. A Study of Boundary Functions and Problems*. With a Foreword by Isaiah Bowman. New York: Columbia University Press, 1940. pp. xviii, 272. Index. \$3.25.
- Brooks, Philip Coolidge. *Diplomacy and the Borderlands: The Adams-Onís Treaty of 1819*. Berkeley: University of California Press, 1939. pp. x, 262. Index.
- Burnett, Philip Mason. *Reparation at the Paris Peace Conference from the Standpoint of the American Delegation*. (Published for the Carnegie Endowment for International Peace, Division of Economics and History.) New York: Columbia University Press, 1940. 2 vols. Index. \$15.00.
- Butler, Nicholas Murray. *Why War? Essays and Addresses on War and Peace*. New York and London: Charles Scribner's Sons, 1940. pp. xii, 323. Index. \$2.50.
- Carr, Edward Hallett. *Britain: A Study of Foreign Policy from the Versailles Treaty to the Outbreak of War*. With a Preface by Viscount Halifax. (Ambassadors at Large: Studies in the Foreign Policies of the Leading Powers.) New York, London and Toronto: Longmans, Green & Co., 1940. pp. x, 196. \$2.00.
- . *The Twenty Years' Crisis 1919-1939*. New York and London: Macmillan Co., 1940. pp. xvi, 313. Index. \$3.00.
- Catlin, George. *Anglo-Saxony and Its Tradition*. New York: Macmillan Co., 1939. pp. xiv, 344. Index. \$3.00.
- Darling, Arthur Burr. *Our Rising Empire, 1763-1803*. New Haven: Yale University Press; London: Humphrey Milford, Oxford University Press, 1940. pp. vi, 595. Index. \$5.00.
- Defense for America*. Views of a number of Americans. Edited with an introduction by William Allen White. New York: Macmillan Co., 1940. pp. xxiv, 205. \$1.00.
- Fen, Ou Tsong. *La Représentation des Intérêts Économiques dans les Organismes Internationaux*. Paris: Éditions Domat-Montchrestien, 1940. pp. 136.
- Fenwick, Charles G. *American Neutrality—Trial and Failure*. New York: New York University Press; London: Humphrey Milford, Oxford University Press, 1940. pp. xiv, 190. Index. \$2.50.
- Finnish Blue Book. *The Development of Finnish-Soviet Relations during the Autumn of 1939, Including the Official Documents and the Peace Treaty of March 12, 1940*. (Published for the Ministry for Foreign Affairs of Finland.) New York and Philadelphia: J. B. Lippincott Co., 1940. pp. 120. \$1.50.

* Mention here does not preclude a later review.

- French Yellow Book. *Diplomatic Documents (1938-1939)*. Papers relative to the events and negotiations which preceded the opening of hostilities between Germany on the one hand, and Poland, Great Britain and France on the other. Published by Authority of the French Government. New York: Reynal & Hitchcock, 1940. pp. xlv, 419. \$2.50.
- Gaither, Roscoe B. *Expropriation in Mexico*. The Facts and the Law. New York: William Morrow & Co., 1940. pp. xii, 204. Index. \$2.00.
- Geshkoff, Theodore I. *Balkan Union*. New York: Columbia University Press, 1940. pp. xvi, 345. Index. \$3.00.
- Griffith, Ernest S. *The Impasse of Democracy*. New York: Harrison-Hilton Books, 1939. pp. 380. Index. \$3.00.
- Guatemala, Ministry for Foreign Affairs. *White Book (Continuation): Belize Question*. By Luis Anderson. (Translated from the Spanish copy.) Guatemala: Tipografia Nacional, 1940. pp. 67.
- Hale, Oron James. *Publicity and Diplomacy*. With Special Reference to England and Germany, 1890-1914. New York and London: D. Appleton-Century Co., 1940. pp. xii, 479. Index. \$4.00.
- Jones, F. C. *Shanghai and Tientsin. With Special Reference to Foreign Interests*. New York, San Francisco, Honolulu: American Council, Institute of Pacific Relations, 1940. pp. xxxii, 182. \$2.00.
- Larkin, John Day. *Trade Agreements*. (Edited by Eugene Staley for the Division of Economics and History of the Carnegie Endowment for International Peace.) New York: Columbia University Press, 1940. pp. xii, 135. Index. \$1.00.
- Matsunami, N. (ed.) *Report of the Japanese Maritime Law Association*. No. 24 (1939). Tokyo: 1940. pp. iv, 728.
- Meade, J. E. *The Economic Basis of a Durable Peace*. New York: Oxford University Press, 1940. pp. 192. Index. \$2.00.
- Mexico, Government of. *The True Facts about the Expropriation of the Oil Companies' Properties in Mexico*. Mexico City: 1940. pp. 271.
- Montague, Ludwell Lee. *Haiti and the United States, 1714-1938*. Durham, N. C.: Duke University Press, 1940. pp. xiv, 308. Index. \$3.00.
- Montfort, Henri de. *Danzig—Port de Pologne dans le Passé et dans le Présent*. Paris: A. Pedone, 1939. pp. x, 128. Fr. 25.
- Naval War College. *International Law Situations with Solutions and Notes, 1938*. Washington: Government Printing Office, 1940. pp. viii, 178. Index. \$.25.
- Norman, E. Herbert. *Japan's Emergence as a Modern State*. New York: International Secretariat, Institute of Pacific Relations, 1940. pp. xvi, 254. Index. \$2.00.
- Royal Institute of International Affairs. *Nationalism*. Report by a Study Group. New York, London, Toronto: Oxford University Press, 1939. pp. xx, 360. Index. \$3.75.
- Séfériadès, S., G. Maridakis, P. Vallindas. *Mélanges Streit*. (In Greek.) Tome I. Athens: Imprimerie "Pyrsos", 1939. pp. xvi, 654.
- Selea, Trifu. *La Notion de l'Abus du Droit dans le Droit International*. Paris: Éditions Domat-Montchrestien, 1940. pp. vi, 188.
- Slovak Council. *The Slovak Question*. A Memorandum submitted by the Slovak Council to Congress of the United States of America. Geneva: 1940. pp. 82.
- Spector, Margaret Marion. *The American Department of the British Government 1768-1782*. New York: Columbia University Press; London: P. S. King & Son, 1940. pp. 181. Index. \$2.25.
- Steiner, H. Arthur. *Principles and Problems of International Relations*. New York and London: Harper & Bros., 1940. pp. xii, 835. Index. \$3.75.
- Stresemann, Gustav. *His Diaries, Letters and Papers*. Vol. III. Edited and Translated by Eric Sutton. New York: Macmillan Co., 1940. pp. vi, 636. \$6.50.
- Taparelli D'Azeglio, Luigi. *Sintesi di Diritto Naturale*. Con Introduzione e Appendice Bio-Bibliografica. Bologna: Nicola Zanichelli, 1940. pp. vi, 74. L. 10.

- Telders, B. M. *Nederlands Onzijdigheid*. Grondslagen en Gevolgen. The Hague: Martinus Nijhoff, 1939. pp. viii, 74. Gld. 0. 80.
- Tobin, Harold J., and Percy W. Bidwell. *Mobilizing Civilian America*. New York: Council on Foreign Relations, 1940. pp. xii, 276. Index. \$2.75.
- United States Tariff Commission. *Reference Manual of Latin American Commercial Treaties*. Washington, D. C.: 1940. pp. xvi, 281.
- Vitta, Edoardo. *La Validité des Traités Internationaux*. Leiden: E. J. Brill, 1940. pp. x, 247. Gld. 12.
- Willoughby, Westel W. *Japan's Case Examined*. With Supplementary Chapters on the Far Eastern Policies of the United States, and the Significance to the World of the Conflict in the Far East. Baltimore: Johns Hopkins Press; London: Humphrey Milford, Oxford University Press, 1940. pp. x, 237. Index. \$2.50.
- Witenberg, J.-C. *Commission Mixte de Réclamations Germano-Américaine. Décisions dans les Affaires de Sabotages allemands aux États-Unis*. En collaboration avec Jacques Desrioux. Tome III. Paris: A. Pedone, 1940. pp. iv, 83.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

AMERICAN BAR ASSOCIATION JOURNAL, May, 1940 (Vol. 26, No. 5). *Chisholm v. Georgia and the British Creditor* (pp. 406-407, 412).

—, June, 1940 (Vol. 26, No. 6). *International Law Societies Meet* (pp. 462-464); *More on Chisholm v. Georgia* (p. 466); *Iceland and the Americas* (pp. 505-509), G. Grimson and S. Johnson.

AMERICAN FOREIGN SERVICE JOURNAL, April, 1940 (Vol. 17, No. 4). *Coöperation between the State, War and Navy Departments* (pp. 192-193, 226-227), S. Chapin and H. Notter.

—, May, 1940 (Vol. 17, No. 5). *Early Records of the Consulate at Zanzibar* (pp. 266-267, 273), E. T. Smith.

—, June, 1940 (Vol. 17, No. 6). *Fifth Foreign Service Conference* (pp. 328, 334-335), C. B. Lyon.

AMERICAN POLITICAL SCIENCE REVIEW, April, 1940 (Vol. 34, No. 2). *Congressional Investigations of Matters of International Import* (pp. 284-294), J. A. Perkins; *Democratic Processes in the Trade Agreements Program* (pp. 317-332), C. Kreider.

CANADIAN BAR REVIEW, April, 1940 (Vol. 18, No. 4). *Peace, Order and Good Government* (pp. 243-260), E. R. Richard; *Conflict of Laws: Tort Committed on Ship on the High Seas* (pp. 308-314), J. D. Falconbridge.

DANUBIAN REVIEW, March, 1940 (Vol. 7, No. 10). *Problems of Danubian Union* (pp. 6-8), C. Robinson; *The Question of Citizenship in Slovakia* (pp. 27-30), Slovacus.

DIRITTO MARITTIMO, February-April, 1940 (Vol. 42, Nos. 1-2). *Salvataggio e Assistenza in Mare* (pp. 1-36), G. Berlingieri; *Sui Termini Preclusivi delle Azioni nei Trasporti Marittimi* (pp. 93-102), E. Bruni; *Diritto di Preda e Diritto di Rappresaglia* (pp. 119-125), R. Sandiford.

FOREIGN AFFAIRS, July, 1940 (Vol. 18, No. 4). *The Anglo-French Alliance* (pp. 601-613), A. Géraud; *The Western Hemisphere as a Haven of Peace* (pp. 614-631), S. Duggan; *Far Eastern Triangle* (pp. 632-645), K. K. Kawakami; *France and Islam* (pp. 680-699), C.-A. Julien; *The Origins of This War: A German View* (pp. 700-718), A. von Wegerer; *The Dutch East Indies Adrift* (pp. 735-741), R. Emerson; *Iceland and Greenland: An American Problem* (pp. 742-746), P. E. Mosely.

FRIEDENS-WARTE, 1940 (Vol. 40, Nos. 1-2). *Das Problem der internationalen Organisation in der Entwicklung der Ostseemächte* (pp. 1-37), H. Wehberg; *Bolívar et Wilson—Le Traité de Panama de 1820 et le Pacte de la Société des Nations de 1919* (pp. 37-46), J. M. Yepes; *Quelques Nouvelles Tendances de la Neutralité* (pp. 46-58), J.-F. Lalive; *Die Grundlagen des 21. Jahrhunderts* (pp. 58-68), R. M. Lonsbach; *Georges Scelle über das Selbstbestimmungsrecht der Völker* (pp. 71-73), Sch.; *Friedensziele der Alliierten* (pp. 73-98); *Die Weihnachtsbotschaft des Papstes* (pp. 99-105), G. Pink; *Dokumente zur Vorbereitung des künftigen Friedens* (pp. 106-117); *Ausgrabungen aus früheren Völkerbund-Projekten und -Diskussionen* (pp. 117-123).

INTERNATIONAL LABOR REVIEW, June, 1940 (Vol. 41, No. 6). *Deferred Pay—The Keynes Plan* (pp. 557-581), E. J. Riches.

KÜLÜGYI SZEMLE, May, 1940 (Vol. 17, No. 3). *Olaszország és a Szuezi Csatorna* (pp. 216-220), Vinicius; *Diplomatáink Utánpótlása* (pp. 221-222), A. Kováts; *Szabadkereskedelem Mint Békecél* (pp. 228-233), A. Török.

MICHIGAN LAW REVIEW, May, 1940 (Vol. 38, No. 7). *Foreign Corporations and Venue in the Federal Courts* (pp. 1047-1063), T. R. Vogt.

NEW COMMONWEALTH QUARTERLY, April, 1940 (Vol. 5, No. 4). *Constitutional Aspects of Anglo-French Union* (pp. 263-271), A. B. Keith; *Aims and Problems of Anglo-French Union* (pp. 272-285), W. Friedmann; *Practical Steps Towards Anglo-French Union* (pp. 286-295), O. Gollancz; *L'Union Franco-Britannique, l'Idée de Hierarchie et le Principe de l'Égalité des États* (pp. 296-304), J. T. Delos; *American Secession and European Anarchy: A Compari-*

son (pp. 305-313), H. G. Nicholas; *An Australian Comment on Streit's Union* (pp. 314-321), A. H. Charteris.

NEW YORK UNIVERSITY LAW QUARTERLY REVIEW, March, 1940 (Vol. 17, No. 3). *The Mexican Expropriations* (pp. 327-384), J. L. Kunz.

UNIVERSITY OF PENNSYLVANIA LAW REVIEW, May, 1940 (Vol. 88, No. 7). *Cancellation of Certificates of Citizenship for Fraud or Illegality in Procurement* (pp. 842-852), G. F. DiB.; *Trade Mark Protection Following "Ineffective" Assignment* (pp. 863-872), S. W. F.

—, June, 1940 (Vol. 88, No. 8). *Extraterritorial Effect of Foreign Decrees and Seizures* (pp. 983-994), J. K. G.

REVISTA DE DERECHO INTERNACIONAL, September, 1939 (Vol. 36, No. 71). *El Sistema Conciliatorio Interamericano y su Funcionamiento según la Convención de Washington* (pp. 32-52), R. J. Alfaro; *La Organización Internacional del Trabajo como Instrumento para la Elaboración de una Legislación Internacional* (pp. 53-76), C. W. Jenks; *Francisco de Vitoria y su Doctrina sobre la Ocupación y Conquista Coloniales* (pp. 77-116), F. Gasa; *El Principio "Rebus Sic Stantibus" como Causa de Extinción de las Obligaciones Internacionales Contractuales* (pp. 117-121), A. P. Méndez.

REVISTA DE LA FACULTAD DE CIENCIAS JURÍDICAS Y SOCIALES DE GUATEMALA, November-December, 1939 (Vol. 3, No. 1). *¿Que Ley Rige en Guatemala las Sucesiones extranjeras o de Carácter internacional?* (pp. 20-24), M. Castejón Fiallos; *Opinión sobre la Cuestión de Belice* (pp. 50-65), A. Carrillo; *Guatemala y los Ingleses* (pp. 66-87), S. Aguilar.

REVUE DE TRANSYLVANIE, October-December, 1939 (Vol. 5, No. 4). *Un Plan de Confédération Danubienne Roumano-Magyaro-Serbe en 1859* (pp. 506-524), E. Pascu.

REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, November-December, 1939 (Vol. 13, No. 6). *Le Traité germano-tchécoslovaque du 15 mars 1939 à la lumière du Droit International* (pp. 653-665), J. Markus; *L'Institut des Hautes Études Internationales et l'Enseignement du Droit des Gens*, Rapport des Directeurs (pp. 666-669).

REVUE INTERNATIONALE FRANÇAISE DU DROIT DES GENS, October-December, 1939 (Vol. 8, Nos. 3-5). *Le Droit International et l'Altération du Rapport État-Individu* (pp. 160-174), L. Preuss; *Traités et Conventions de la "Zone du Canal" de Panama* (pp. 175-189), F. Cosentini; *Le Régime des Prisonniers de Guerre* (pp. 190-212), R. Meitani; *L'Extension des Règles de la Neutralité dans le Droit Maritime du Temps de Guerre* (pp. 213-223), R. Genet; *Le Droit Maritime pour le Temps de Guerre et le nouveau Conflit Européen* (pp. 223-227); *Allemagne-Pologne: Le Différend au sujet de Dantzig—Origines de la Guerre Européenne* (pp. 228-255); *Japon-Chine: Le Règlement de l'Affaire de Tien-Tsin—Conversations anglo-nippones* (pp. 263-272).

RIVISTA DI DIRITTO INTERNAZIONALE, January-March, 1940 (Vol. 19, No. 1). *La Condizione Giuridica degli Inviati Diplomatici Cittadini dello Stato Accreditatario* (pp. 54-89), L. Marino; *Sull'Esenzione degli Agenti Diplomatici dalla Giurisdizione* (pp. 95-98), T. P.

YALE LAW JOURNAL, April, 1940 (Vol. 49, No. 6). *Public Policy and the Political Crisis in the Conflict of Laws* (pp. 1027-1058), A. Nussbaum.

—, May, 1940 (Vol. 49, No. 7). *Application of the Anti-Trust Laws to Extra-Territorial Conspiracies* (pp. 1312-1319), R. T. Molloy.

ZEITSCHRIFT FÜR VÖLKERRECHT, 1940 (Vol. 24, No. 1). *Das Französische Mandat über Syrien und das Alexandrette-Problem* (pp. 1-30), H. U. Scupin; *Sechs Monate Seekriegsrecht* (pp. 31-49), C. Eckhardt; *Die Ratifikationen im Weltpostverein* (pp. 50-69), H. Scheuffler; *Rechtsfragen zum Grenzstreitigen Gebiet von Moersnet* (pp. 70-90), H. Merzdorf.

ELEANOR H. FINCH

NEGLECTED ASPECTS OF THE DESTROYER DEAL

By HERBERT W. BRIGGS

Of the Board of Editors

On September 3, 1940, President Franklin D. Roosevelt sent to Congress a message in which he stated, in part:

I transmit herewith for the information of the Congress notes exchanged between the British Ambassador at Washington and the Secretary of State on September 2, 1940, under which this Government has acquired the right to lease naval and air bases in Newfoundland, and in the islands of Bermuda, the Bahamas, Jamaica, Santa Lucia, Trinidad, and Antigua, and in British Guiana; also a copy of an opinion of the Attorney General, dated August 27, 1940, regarding my authority to consummate this arrangement.

The right to bases in Newfoundland and Bermuda are gifts—generously given and gladly received. The other bases mentioned have been acquired in exchange for 50 of our overage destroyers.

✓ This is not inconsistent in any sense with our status of peace . . . ¹

Since the official status of the United States Government is a status of neutrality,² it has seemed to the writer that certain legal aspects of the transfer of naval vessels from a neutral navy to a belligerent navy received inadequate attention in the opinion, dated August 27, 1940, of Mr. Robert H. Jackson, the Attorney General. The following observations, both historical and legal, are submitted in the hope that they may help to keep the ✓ record clear.³

THE TORPEDO BOAT INCIDENT

Towards the middle of June, 1940, the Senate Naval Affairs Committee, which was drafting new legislation to enlarge the United States Navy and to

¹ The complete text of the message and accompanying papers is in the Congressional Record, 76th Cong., 3rd Sess., for Sept. 3, 1940, pp. 17276-17279; also in H. Doc. No. 943, 76th Congress. The Attorney General's opinion is reproduced, *infra*, p. 728; the message and notes in the accompanying Supplement, pp. 183, 184.

² In view of certain recent attacks on the neutrality policy of the United States, perhaps it should be recalled that the Neutrality Act of 1939 has not been repealed, nor have the President's proclamations of neutrality been rescinded. International law recognizes no such thing as the so-called "status" of non-belligerency. "Non-belligerency" is in reality only a euphemism designed to cover violations of international law in the field of neutral obligation.

³ The writer will not attempt to discuss the larger political or strategic aspects of the deal, nor even those parts of the Attorney General's opinion which treat of the constitutional authority of the President to consummate the arrangement without the consent of Congress. The latter point is discussed elsewhere in this JOURNAL. (See editorial comments, pp. 680, 690. The writer is aware that a lawyer will not always do more than apply a logico-grammatical interpretation to the words of a law he may be construing, but since the Attorney General, in his opinion dated August 27, interpreted the law in question within the larger frame of reference of its legislative history and the Congressional intent to implement international law, the writer will follow the same method.

expedite naval shipbuilding, heard rumors that United States destroyers were to be transferred to a foreign Power. In executive session the Committee inquired of a naval officer, who was present, about the truth of the rumors. In the words of Senator David I. Walsh, the able Chairman of the Committee, the naval officer "vehemently said that the Navy would never give up its destroyers; that we would not be equipped for war for two years, and that the Navy would not approve of such action. . . . He remained silent as to anything else."⁴

The Committee voted to ask President Roosevelt "just what property of the Navy, surplus property or other property, had been disposed of." Senator Walsh later told the Senate:

There was present in the room a naval officer when this executive vote was taken. The next morning, before any letter could be transmitted or information given, I was called on the telephone by the Acting Secretary of the Navy [Lewis Compton] and informed that 11 motor torpedo boats and 12 motor submarine chasers, making a total of 23 vessels, had been disposed of. It is needless to say that I was shocked. It was the first intimation that had come to me or any member of my committee about this matter . . . [Mr. Compton] informed me that the day before the Navy had modified its contracts with the shipbuilding company at New Jersey, so that the 23 vessels, when completed—the first one being completed in about two months—could be delivered to the Allies, and that our Government would delay acceptance or delivery to it of the 23 vessels. The committee sent for the Assistant Secretary of the Navy, and also the naval officer referred to, and we catechized them in reference to the whole matter. We then for the first time discovered that negotiations for transferring material had been going on for 3 months. Negotiations for the mosquito fleet had been in progress for 3 weeks.⁵

In the same executive session of the Senate Naval Affairs Committee, Senator Walsh asked Acting Secretary Compton: "On what law did you rely to do this?" Compton replied that the Navy Department, like practically every other department, could modify contracts under general legislation passed by Congress. In telling the story to the Senate, Mr. Walsh commented:

Now, Senators, see how careful we shall have to be in our legislation. They have a right to modify or change their contracts. So, all these transactions have been based, not on any legal authority—for they have none—to dispose of any property except surplus, but upon the fact that they have authority to modify or change contracts. Who in God's name, in Congress or in the country, thought, when such a power was given, that these contracts for our own protection would be modified or changed in order to assist one side or the other, or all sides, of belligerents at war?⁶

⁴ For the detailed story, see the statements of Senator Walsh in the Senate, June 21, 1940. Congressional Record, 76th Cong., 3rd Sess., p. 13315 ff. (All references herein to the Congressional Record are to the daily edition.)

⁵ *Ibid.*, pp. 13315, 13317.

⁶ *Ibid.*, p. 13319.

Acting Secretary Compton denied before the Senate Naval Affairs Committee that he had consulted President Roosevelt about the modification of the torpedo boat contracts, or that he had been requested to cancel the contracts, or that he had consulted anybody except Secretary of the Treasury Henry Morgenthau, who, as Mr. Walsh said, was "the negotiator with representatives of the Allies in the disposition of the surplus and other property."⁷ Several days later, Mr. Stephen Early, Secretary to the President, stated that President Roosevelt had personally approved the sale of the torpedo boats, for which the Acting Secretary of the Navy had previously taken "full and complete responsibility." As a result of the unfavorable publicity over the torpedo boat incident, and because of an informal opinion of the Attorney General that the transfer of the boats to a belligerent would seem to be illegal, the President called off the deal;⁸ and the Senate Naval Affairs Committee decided to introduce legislation (ultimately passed as Sec. 14 of the Act of June 28, 1940, Public No. 671) to prevent such transfers of naval vessels in the future.

SECTION 14 OF THE ACT OF JUNE 28, 1940

On June 21, 1940, when the Senate commenced consideration of H. R. 9822,⁹ an act to expedite naval shipbuilding, Senator Walsh explained that "the Committee on Naval Affairs has inserted in the bill every conceivable precaution against the limitation or reduction in size of our Navy," and had endeavored "to put every possible safeguard into the bill . . . and to see that there is not in the future any attempt made to lessen our defenses so far as the Navy is concerned."¹⁰ There followed his revelation to the Senate of the scheme to sell the torpedo boats to Britain, which, he explained, the Committee had discovered "only by the merest accident." He then read to the Senate Sections 3 and 6 of Title V of the Act of June 15, 1917,¹¹ and explained to the Senate that it was "a law which makes illegal the act of sending naval vessels out of the country while we are a neutral."¹²

Subsequent to this statement, Senator Walsh sent to the desk an amendment to add a new section (Section 14) to the bill, stating that "it was

⁷ Congressional Record, 76th Cong., 3rd Sess., p. 13319.

⁸ Cf. text of White House statement reprinted in New York Times, June 25, 1940. The statement stressed the experimental nature of the boats and the advantages to the Navy of turning in new boats before they had even been tried out. They were also criticized because they were designed to carry only 18-inch, instead of 21-inch, torpedoes, and the Navy had only a limited number of 18-inch torpedoes on hand, but the President's Secretary, Mr. Early, stated that 18-inch torpedoes could be delivered by "late Fall." New York Times, June 20, 1940. Cf. also discussion in Cong. Rec., June 21, pp. 13320-13321.

⁹ Eventually the Act of June 28, 1940, Public No. 671.

¹⁰ Cong. Rec., June 21, 1940, p. 13314.

¹¹ For the texts of Secs. 3 and 6, see below, p. 575.

¹² Cong. Rec., June 21, 1940, p. 13318.

submitted to me since the debate began; but the intention and purpose of it I know and the committee knew."¹³

As finally enacted into law, Section 14 of the Act of June 28, 1940, reads as follows:

Sec. 14. (a) Notwithstanding the provision of any other law, no military or naval weapon, ship, boat, aircraft, munitions, supplies, or equipment, to which the United States has title, in whole or in part, or which have been contracted for, shall hereafter be transferred, exchanged, sold, or otherwise disposed of in any manner whatsoever unless the Chief of Naval Operations in the case of naval material, and the Chief of Staff of the Army in the case of military material, shall first certify that such material is not essential to the defense of the United States.

(b) The Secretary of War and the Secretary of the Navy as the case may be are hereby requested and directed to furnish or cause to be furnished to the respective chairmen of the Committees on Military Affairs and the Committees on Naval Affairs of the Senate and House of Representatives a copy of each contract, order, or agreement covering exchange of deteriorated, unserviceable, obsolescent, or surplus military or naval equipment, munitions, or supplies exchanged for other military or naval equipment, munitions or supplies, and a copy of each contract, order, or agreement shall be furnished regarding any other disposition of military or naval equipment, munitions and supplies by which the title passes, either *de jure* or *de facto*, from the United States, or by which delivery of material thereunder is deferred, where the original cost of such military or naval equipment, munitions or supplies exceeded or exceeds \$2,000. The copies of each contract, order, or agreement herein referred to shall be transmitted to the respective chairmen of the committees not later than twenty-four hours after such contract, order or agreement is made, and the chairman of each committee shall consider such contracts, orders or agreements confidential unless a majority of the members of his committee shall direct the particular transaction to be made public.

(c) Nothing herein shall be construed to repeal or modify Sections 3 and 6, Title V of the Act approved June 15, 1917 (40 Stat. 222; U. S. C., Title 18, Secs. 33 and 36).¹⁴

As originally drafted (but not as first submitted to the Senate), Senator Walsh explained,¹⁵ Sec. 14 (a) contained a proviso that no transfers should take place "without the approval of Congress." These words were dropped with the approval of Mr. Walsh because he "was content with the present law as it stands." As first submitted to the Senate, the words "and cannot be used in" appeared in the last clause of Sec. 14 (a) after the words "not essential to."¹⁶ Senator Hale objected to Sec. 14 (a) in its entirety because it would stop "supplying the Allies with any [Army or Navy] planes by deferring the contract deliveries, as we have been doing." Senator Walsh

¹³ Cong. Rec., June 21, 1940, p. 13369.

¹⁴ Public No. 671, 76th Cong., 3d Sess.

¹⁵ Cong. Rec., June 21, 1940, p. 13371.

¹⁶ As first submitted to the Senate, the clause read: "shall first certify that such material is not essential to and cannot be used in the defense of the United States." Cong. Rec., June 21, 1940, p. 13368.

replied that the only purpose of Sec. 14 (a) was "that the Chief of Naval Operations and the Chief of Staff of the Army shall certify that the material is not needed." Senator Barkley feared Sec. 14 (a) would interfere with the turning back to manufacturers of certain surplus or used airplanes, engines, and motor vehicles, as authorized in Sec. 1 of H. R. 9850,¹⁷ but Senator Walsh assured him that subsection 14 (a) only required certification that things were "not needed for our defense." Senator Hill brought up the point that the words (then in Sec. 14 (a)) "cannot be used in the defense of the United States" required too much, as even obsolete, old muskets could be used for defense. Senator Walsh agreed that the phrase "cannot be used" required "too exacting a judgment," and the words were deleted.¹⁸

There is no evidence that the deletion of the phrase "cannot be used" was made by the Senate so that naval vessels could be branded as obsolete and transferred to a foreign Power. The disposal or exchange of really surplus, obsolescent, or deteriorated materials is a necessity for both the Army and the Navy. In drafting Sec. 14 Congress recognized the wisdom of refraining from legislative interference in genuine transactions of this kind; refrained from requiring the consent of Congress for each such routine transaction; and refrained from insisting that deteriorated or surplus equipment be nothing but scrap, whose usefulness is entirely gone. However, Congress did specifically forbid, in Sec. 14 (a), the transfer or disposal of military or naval materials (including aircraft and naval vessels) unless the appropriate staff officers were willing to certify that such materials were not essential to the defense of the United States; and as a further measure of safeguard it stipulated in Sec. 14 (b) that its appropriate committees be informed to what extent our defenses were being reduced by the indirect transfer of Army and Navy materials to a foreign Power.¹⁹

¹⁷ H. R. 9850, which eventually became the Act of July 2, 1940, Public No. 703, was passed by the Senate on June 11, 1940. It should be noted that this law refers only to army equipment, not naval vessels. The pertinent provision of Sec. 1 reads that the Secretary of War is authorized "(3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section . . ." Cf. also the discussion of this provision in the Senate on June 11, 1940, Cong. Rec., pp. 12040-12049.

¹⁸ Cong. Rec., June 21, 1940, pp. 13369-13371. Senator Barkley made no reference to naval vessels. On the other hand, the protection of the Navy from reductions which would weaken it was the prime objective of Senator Walsh throughout the debate.

¹⁹ Cf. the statement of Senator Walsh: "We then [June 14] learned for the first time that for 3 months negotiations had been going on for the transfer or release of naval property of one kind or another . . . of which no member of the Congress had the slightest information or knowledge." Cong. Rec., June 21, 1940, p. 13315. Cf. also the discussion which followed. *Ibid.*, pp. 13315-13321.

Sec. 14 (b) is not in itself a restriction on the preëxisting authority of the Army and Navy to dispose of certain equipment, but a study of it, and its legislative history, would have aided the Attorney General in discovering the intent of Congress in drafting Sec. 14 (a).

One further comment should be made here in the light of Attorney General Jackson's ruling on Sec. 14 (a). (Section 14 was never intended by Congress as an *authorization* for any transfer of naval vessels to a foreign Power.) It referred back, as Senator Walsh repeatedly said, to existing laws on the disposal of surplus or obsolete equipment. Although the Attorney General is careful not to say that Sec. 14 (a) does constitute an additional authorization, he proceeds to interpret the subsection as virtually requiring the Chief of Naval Operations to certify that the destroyers were not essential to the defense of the United States, if, in Admiral Stark's opinion, the naval bases to be gained in exchange more than balanced the loss of the vessels.²⁰

Admiral Stark, Chief of Naval Operations, may really have changed his mind about the desirability of releasing the destroyers from the United States Navy, but in certifying their release, in his letter to the President, he indicates strongly that he is making the certification because the Attorney General's interpretation of Sec. 14 (a) virtually requires him to.²¹ This was just what the Congress, in enacting Sec. 14, sought to prevent, but the Attorney General's opinion virtually changes a legislative restriction into an authorization.

Two other statements of the Attorney General should be mentioned here. He states: "There is no reason whatever for holding that sales may not be made to or exchange made with a foreign government . . ."; and adds that Sec. 14 (a) "was enacted by the Congress in full contemplation of transfers for ultimate delivery to foreign belligerent nations."²² The clear answer—as

²⁰ See Mr. Jackson's instructions in three successive paragraphs to the appropriate staff officers that they not only may, but *should*, make the certifications as he indicates. *Infra*, p. 733.

²¹ Admiral Stark's letter is as follows (from Cong. Rec. for Sept. 3, 1940, p. 17279):

September 3, 1940

TO THE PRESIDENT OF THE UNITED STATES:

1. Concerning the proposed transfer of destroyers to Great Britain in exchange for naval and air bases, the Attorney General of the United States in an opinion held as follows:

"It is my opinion that the Chief of Naval Operations may, and should, certify under Section 14 (a) that such destroyers are not essential to the defense of the United States if in his judgment the exchange of such destroyers for strategic naval and air bases will strengthen rather than impair the total defense of the United States."

2. It is my opinion that an exchange of 50 over-age destroyers for suitable naval and air bases on 99-year leases in Newfoundland, Bermuda, the Bahamas, Jamaica, Santa Lucia, Trinidad, Antigua, and in British Guiana will strengthen rather than impair the total defense of the United States. Therefore, I certify that on the basis of such an exchange, and in accordance with the opinion of the Attorney General of the United States, the 50 over-age destroyers of the so-called 1,200-ton type are not essential to the defense of the United States.

H. R. STARK

Admiral, United States Navy,
Chief of Naval Operations

²² Such transfers constitute a violation of the rule of international law codified in Art. 6 of Hague Convention XIII of 1907: "Art. 6. The supply, in any manner, directly or in-

regards naval vessels—to these statements is contained in paragraph (c) of Sec. 14, *viz.*, that it was the intention of Congress to reiterate the prohibition of Sec. 3 of Title V of the Act of June 15, 1917, against the sending out of war vessels for belligerent use or for delivery to a belligerent. Neither in the Senate nor the House of Representatives was the restrictive interpretation later placed on this section by the Attorney General considered for a moment.²³

Now, it is conceivable, of course, that, through a misunderstanding, Congress may have failed to enact into law its Congressional intent. This possibility requires that the Act of June 15, 1917, be examined.

SECTION 3 OF THE ACT OF JUNE 15, 1917

The texts of Sections 2, 3, and 6 of Title V ("Enforcement of Neutrality") of the Act of June 15, 1917,²⁴ are as follows:

Sec. 2. During a war in which the United States is a neutral nation, the President, or any person thereunto authorized by him, may detain any armed vessel owned wholly or in part by American citizens, or any vessel, domestic or foreign (other than one which has entered the ports of the United States as a public vessel), which is manifestly built for warlike purposes or has been converted or adapted from a private vessel to one suitable for warlike use, until the owner or master, or person having charge of such vessel, shall furnish proof satisfactory to the President, or to the person duly authorized by him, that the vessel will not be employed by the said owners, or master, or person having charge thereof, to cruise against or commit or attempt to commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with which the United States is at peace, and that the said vessel will not be sold or delivered to any belligerent nation, or to an agent, officer, or citizen of such nation, by them or any of them, within the jurisdiction of the United States, or, having left that jurisdiction, upon the high seas.

Sec. 3. During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.

Sec. 6. Whoever, in violation of any of the provisions of this title, shall take, or attempt or conspire to take, or authorize the taking of any such vessel, out of port or from the jurisdiction of the United States,

directly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden." 36 U. S. Statutes at Large 2415. Cf. L. H. Woolsey "Government traffic in contraband," this JOURNAL, Vol. 34 (July, 1940), pp. 498-503.

²³ Cf. Cong. Rec., June 21, 1940, pp. 13276-13277; 13318.

²⁴ 40 Stat. 217, 221; 18 U. S. C., Ch. 2, Secs. 32, 33, 36.

shall be fined not more than \$10,000 or imprisoned not more than five years, or both; and, in addition, such vessel, her tackle, apparel, furniture, equipment, and her cargo shall be forfeited to the United States.

The controversy over the meaning of Sec. 3 of this law is (essentially) whether it makes unlawful the sending out only of war vessels *built with intent to deliver* to a belligerent, or whether, on the contrary, it makes unlawful the *sending out*, of *any* war vessel with intent to deliver to a belligerent.²⁵

The legislative history of this provision is meager, but when combined with the declared purpose of the Department of Justice (which originally drafted the section),²⁶ it is adequate to indicate the purpose of the law. In his Annual Report for 1916, Attorney General T. W. Gregory states:

The present laws relating to neutrality are clearly defective. In some cases no statutory provision whatever is made for the observance of obligations imperatively imposed by international law upon the United States; in other cases inadequate provision is made.

He added that he was submitting recommendations for new legislation which was required "for the fulfillment of the duty owed by the United States to other nations with which it is at peace"; and that the recommendations had been concurred in by the Secretary of State and by the Joint State and Navy Neutrality Board.²⁷

With reference to the recommendation which later became Sec. 3 of the Act of June 15, 1917, Mr. Gregory noted that the then existing Sec. 11 of the Penal Code "only forbids the fitting out or arming. It does not include the *building* or *dispatching*."²⁸ He cites Rule 1 of the Treaty of Washington of 1871 and Article 8 of Hague Convention XIII of 1907, neither of which imposes on neutral governments any obligation to prevent the *building* of warships for belligerents, but both of which require of a neutral government measures to prevent the *departure* from its jurisdiction of any vessel in-

²⁵ The rubric heading of this section of the United States Code reads: "Same [*i.e.*, Enforcement of Neutrality]; sending out armed vessel with intent to deliver to belligerent nation."

²⁶ It was stated in Congress on April 30, 1917, that the bill was originally prepared in the Department of Justice under the direction of the Assistant Attorney General, Mr. Charles Warren. Cong. Rec., 65th Cong., 1st Sess., Vol. 55, Part 2, p. 1591. The House Committee of the Judiciary revised the phraseology submitted by the Department of Justice, but the Senate substituted its bill for the House bill. *Ibid.*, p. 1590, and below, note 33.

²⁷ Annual Report of the Attorney General of the United States for the Year 1916, p. 13.

²⁸ *Ibid.*, p. 15. Italics added. Sec. 11 of the Penal Code of 1909 is at present embodied in 18 U. S. C., Ch. 2, Sec. 23. Its provisions date back to Sec. 3 of the Act of June 5, 1794, which was designed to make unlawful the fitting out or arming of privateers with intent of use by belligerents. At that time, notes C. C. Hyde, "the sending abroad for sale of vessels adapted for hostile uses was not sought to be thwarted, because it was not believed that there existed a legal duty of prevention." International Law Chiefly as Interpreted and Applied by the United States (1922), Vol. 2, p. 711.

tended to engage in belligerent operations, if the vessel was specially adapted within the neutral's jurisdiction to warlike use.

The pertinent provisions of the Treaty of Washington of May 8, 1871, read:

A neutral government is bound—

First, to use due diligence to prevent the fitting out, arming or equipping within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within its jurisdiction, to warlike use . . .

And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them.²⁹

Article 8 of Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, signed at The Hague, October 18, 1907, is as follows:

A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which has been adapted entirely or partly within the said jurisdiction for use in war.³⁰

By these provisions two general obligations binding on neutral governments are recognized: (1) an obligation to take measures to prevent fitting out or arming of vessels which a government believes are intended for belligerent use; and (2) an obligation to take similar measures to prevent the departure of vessels intended for belligerent use, if the vessels have been locally adapted to warlike use. The former obligation has been recognized by the municipal law of the United States since 1794.³¹ The latter—the obligation to take measures to prevent the departure (the dispatching, the sending out) with intent that war vessels be put to belligerent use—Mr. Gregory pointed out, was not covered by any statutory provision, and new legislation was necessary so that the United States might fulfil its obligation

²⁹ Papers relating to the Treaty of Washington, Vol. I, p. 14; H. Ex. Doc. 1, Vol. 1, 42nd Cong., 3rd Sess., 1872.

³⁰ 36 U. S. Stat. L. 2415; this JOURNAL, Supp., Vol. 2 (1908), p. 206. See below, p. 580, for a discussion of the validity of these provisions as rules of international law.

³¹ Sec. 3 of Act of June 5, 1794; at present Sec. 23 of 18 U. S. C., Ch. 2. Cf. Deák and Jessup, A Collection of Neutrality Laws, Regulations, and Treaties of Various Countries (1939), Vol. II, p. 1080. See also above, note 28.

under Rule 1 of the Treaty of Washington and Article 8 of Hague Convention XIII.²²

There was no discussion in Congress (in 1917) of Sec. 3 of Title V of the Act of June 15, 1917, but, as Attorney General Jackson points out in his opinion of August 27, 1940, Congress stated (in House Report No. 30, 65th Cong., 1st Sess., p. 9) its intention of implementing the rules of international law, by quoting Mr. Gregory's reason for transmitting his recommendations.²³

On the basis of the evidence just set forth, it seems clear that the drafters of Sec. 3 intended to make it unlawful, when the United States is a neutral, to send out *any* war vessel with intent of delivery to a belligerent or with cause to believe that it will be put to the use of any belligerent after its departure from the United States. It is not the *building* with such intent or for such use which is prohibited by Sec. 3, but the *sending out* with such intent or for such use. Moreover, this interpretation is perfectly consistent with the language and the declared purpose of the section, and the only interpretation which satisfies the requirements of international law.

Charles Cheney Hyde, formerly Solicitor of the Department of State, specifically accepts this interpretation of Sec. 3 in his *International Law Chiefly as Interpreted and Applied by the United States*.²⁴ He adds:

It is to prevent the departure from its territory of a vessel concerning whose hostile mission requisite evidence exists, that the neutral is called upon to exercise vigilance. Local prohibitions of preliminary acts pre-

²² Much use was made in the Burlingham letter (see below, note 85) of the fact that Mr. Gregory quoted only parts of the first part of Rule 1; but Mr. Gregory also referred to "dispatching" (the "departure" of the latter half of Rule 1), and his partial quotation was intended to explain the reason for adding to Section 3 the words "or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States."

²³ See below, p. 586. It is interesting to note that, as passed by the House of Representatives, Sec. 3 (then numbered 503) contained no trace of ambiguity on the point we are discussing. It read: "During the existence of a war in which the United States is a neutral, it shall be unlawful for the master, owner, or person having charge of any vessel built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, to send the vessel out of the jurisdiction of the United States with any intent or under any agreement or contract, written or oral, that it shall be delivered to a belligerent nation, or to an agent, officer, or citizen thereof, or with reasonable cause to believe that it will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States." H. Rept. No. 30, 65th Cong., 1st Sess., p. 4. This phraseology was lost in the shuffle when the Senate substituted its bill, S. 2, for H. R. 291. Two conference reports were required to settle differences between the two Houses on Title I dealing with espionage. Both conference reports kept the Senate phraseology of Sec. 3 of Title V (which was based on the phraseology submitted by Mr. Gregory), and both statements of the House conferees informed the House that "no material change was made in the provisions" of Title V. Cf. H. Rept. No. 65, pp. 18-19 and H. Rept. No. 69, p. 19 (65th Cong., 1st Sess.). Cf. also Cong. Rec., 65th Cong., 1st Sess., Vol. 55, Parts 2-4.

²⁴ (1922) Vol. 2, p. 714.

paring a ship for such a mission . . . are, therefore, attributable to domestic policy . . .³⁵

The phraseology both of the Rules of the Treaty of Washington and of the Hague Convention of 1907 have obscured this fact because they have been so drafted as to suggest a legal duty on the part of a neutral to prevent the commission of acts antecedent to and other than the departure of a ship . . .³⁶

The purpose of a domestic law is to assist the neutral in the performance of its international obligations. To that end a statute may be framed with a view to punishing persons committing acts such as the fitting out and arming of vessels designed for a belligerent service, and which, unless thwarted, will tend to result in the commission by possibly other individuals of unneutral acts which the state is burdened with a duty to endeavor to prevent. It is conceivable, however, that every local statute may be violated, and yet the neutral, although its task of prevention is thereby rendered increasingly difficult, be guilty of no censurable conduct because of its success in preventing the departure of a vessel from its waters; for no wrong is done a belligerent so long as the ship is retained therein.³⁷

THE REQUIREMENTS OF INTERNATIONAL LAW

Since Attorney General Jackson has questioned whether international law does require a neutral state to forbid the sending out of "vessels, like the over-age destroyers, which were not built, armed, equipped as, or converted into vessels of war with the intent that they should enter the service of a belligerent", an examination must be made of international law on this point.

In the late 18th and early 19th centuries, as Hyde points out,³⁸ the obligation of a neutral government to prevent the departure of war vessels was generally limited to using means to prevent the departure only of those war vessels which were armed or fitted out with intent that they be used by an existing belligerent. As Mr. Justice Story said, by way of *dictum*, in *The Santissima Trinidad*: "there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."³⁹ Not even Story, however, said that a neutral government could sell or transfer warships to a belligerent: his dictum was only to the effect that a neutral government was not obligated to prevent its citizens from trading in warships not armed to the order of a belligerent, as contraband. Moreover, this dictum of Story has by now been pretty generally rejected⁴⁰ as obsolete, except by certain British authors, a few of

³⁵ (1922) Vol. 2, p. 714.

³⁶ *Ibid.*, p. 714, n. 3.

³⁷ *Ibid.*, p. 715, n. 2.

³⁸ *Ibid.*, pp. 693, 695, 711-712.

³⁹ 7 Wheaton (1822) 283, 340.

⁴⁰ Cf., for example, Case of the United States at Geneva, Papers relating to the Treaty of Washington (1872), I, 82: "Without wearying the patience of the Tribunal in the further

whom have kept up their sense of grievance over the loss of the *Alabama* arbitration.

As distinguished from British authors, the British Government has accepted the Rules of the Treaty of Washington as international law.⁴¹ If any doubt remained that a neutral government is bound to use due diligence to prevent the departure from its jurisdiction of *any* war vessel intended for belligerent service (and adapted as a war vessel within its jurisdiction), this doubt was dissipated when the Second Hague Conference in 1907 embodied the principle in the second sentence of Article 8 of Convention XIII.⁴²

THE HAGUE CONVENTION AS INTERNATIONAL LAW

It has been asserted, however, that this Hague Convention is not applicable as international law because, by Article 28 of the convention, it is stated that "the provisions of the present convention do not apply except to the contracting powers, and then only if all the belligerents are parties to the convention,"⁴³ and Great Britain and Italy are now belligerents not "parties to the Convention."⁴⁴ This contention overlooks the fact that Article 8 of this convention is today generally regarded as merely declaratory of rules of international law which are independently binding on states, whether or not they have ratified Convention XIII, whether or not all the belligerents are parties to the treaty.⁴⁵

discussion of this question, it will be assumed that a vessel of war is not to be confounded with ordinary contraband of war. Indeed, the only respectable authority which has been cited even apparently to the contrary, is an observation which Mr. Justice Story thrust into the opinion of the Supreme Court of the United States, upon the case of the *Santisima Trinidad*. See also the review of the opinions of distinguished international lawyers, presented by John Bassett Moore in his *History and Digest of . . . International Arbitrations* (1898), Vol. I, pp. 670-675.

"The above rules [of Treaty of Washington] may be said to have acquired the force of generally recognized rules of international law, and the first of them is reproduced almost textually in Article 8 of the Hague convention No. XIII of 1907 concerning the rights and duties of neutral powers in case of maritime warfare, the principles of which have been agreed to by practically every maritime state." Colville Barclay, British Chargé d'Affaires in Washington, to Secretary of State Bryan, Aug. 4, 1914. U. S. Foreign Relations, 1914, Supplement, p. 594.

⁴¹ For the text, see above, p. 577.

⁴² 36 Stat. 2415. The official French text reads "*qu'entre les Puissances Contractantes*."

⁴³ Deak and Jessup (*A Collection of Neutrality Laws, Regulations and Treaties*, 1939, Vol. II, p. 1376), note that "according to available information this convention [XIII] is at present in force by reason of ratification of the original signature or by virtue of subsequent adherence, between the following countries: Austria, Belgium, Brazil, China, Denmark, El Salvador, Finland, France, Germany, Guatemala, Haiti, Hungary, Japan, Liberia, Luxembourg, Mexico, Netherlands, Nicaragua, Norway, Panama, Portugal, Rumania, Russia, Siam, Sweden, Switzerland and the United States."

⁴⁴ The same might be said of many other articles of Convention XIII, including Article 6, and of some of the other Hague Conventions. Cf. the cases of *The Mörve*, [1915] P. 1, and *The Blonde*, [1922] 1 A. C. 313, where British courts considered the problem and applied rules of Hague Convention VI as international law, even though the treaty had not been ratified by the British Government.

During the World War, although not all the belligerents were parties to Hague Convention XIII, a large number of neutral states, including Argentina,⁴⁶ Bolivia,⁴⁷ Chile,⁴⁸ Ecuador,⁴⁹ El Salvador,⁵⁰ Greece,⁵¹ Guatemala,⁵² Honduras,⁵³ Mexico,⁵⁴ Spain,⁵⁵ and Uruguay,⁵⁶ adopted the provisions of Convention XIII as declaratory of international law. Most of these states were not parties to the convention. Similarly, during the war between Bolivia and Paraguay in 1933, Argentina,⁵⁷ Chile,⁵⁸ and Peru⁵⁹ adopted as neutrals the provisions of Convention XIII, although neither belligerent was a party to the treaty. This evidence supports the statement that Hague Convention XIII is generally regarded by states as merely declaratory of international law whether or not all belligerents are parties to the convention, and tends to confirm the statement of the British Government in August, 1914, that the principles of Rule 1 of the Treaty of Washington and of Article 8 of Hague Convention XIII were even by 1914 regarded as stating rules of international law.⁶⁰

THE PRACTICE OF STATES

In addition to the general acceptance of the principles set forth in Article 8 of Hague Convention XIII, there is evidence of the acceptance of obligations to prevent the sale, transfer, supplying to, leaving, departure, dispatching, or the furnishing to a belligerent of any war vessel, in the national laws

⁴⁶ Deák and Jessup, *op. cit.*, p. 7. The Argentine decrees considered "that the principles of international law consecrated by the opinion of authors and by the practice of nations have been condensed in the clauses of the Convention" XIII.

⁴⁷ *Ibid.*, p. 79.

⁴⁸ *Ibid.*, p. 370. The Chilean Minister of Foreign Relations stated that the "Conventions of The Hague ought to be followed, even though they have not been ratified by the Government of Chile, it being understood that they are declaratory of the principles of international law universally recognized."

⁴⁹ *Ibid.*, pp. 551, 556.

⁵⁰ *Ibid.*, p. 570.

⁵¹ *Ibid.*, p. 669.

⁵² *Ibid.*, p. 679.

⁵³ *Ibid.*, p. 697.

⁵⁴ *Ibid.*, p. 771.

⁵⁵ *Ibid.*, p. 938.

⁵⁶ *Ibid.*, p. 1270.

⁵⁷ *Ibid.*, p. 10. On this occasion, the Argentine declaration stated that the fact that Hague Conventions V and XIII had not been ratified by Argentina "does not diminish their value as a body of principles and practices of the laws and customs of war, which, as general principles recognized by civilized nations, set forth the rights and duties of neutral states."

⁵⁸ *Ibid.*, p. 357.

⁵⁹ *Ibid.*, p. 874.

⁶⁰ See above, note 41. It would also appear from press reports during the present war that Hague Convention XIII was cited as international law by the United States, Germany, Russia, and Norway in the *City of Flint* case, and by Great Britain, Germany, and Norway in the *Altmark* case. Cf. also P. C. Jessup, "The Reality of International Law," *Foreign Affairs*, Vol. 18 (1940), p. 244 ff.

and neutrality proclamations of a number of states. Since 1870, for example, British law has provided that:

8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts . . .

(4) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state:

Such person shall be deemed to have committed an offence against this Act . . .⁶¹

✓ Similar prohibitions have appeared in the laws and neutrality proclamations of Brazil,⁶² Canada,⁶³ China,⁶⁴ Costa Rica,⁶⁵ Denmark,⁶⁶ Estonia,⁶⁷ Finland,⁶⁸ Iceland,⁶⁹ Latvia,⁷⁰ Lithuania,⁷¹ Netherlands,⁷² Norway,⁷³ and Sweden,⁷⁴ many of which have never ratified Hague Convention XIII. ✓

Several "precedents" have recently been referred to in the press as justifying the transfer of destroyers from the United States Navy to Great Britain. One which has been most persistent alleges that, during the Spanish-American War, Great Britain sold two warships, the *New Orleans* and the *Albany*, to the United States. The facts are that these ships were being built in England for the Brazilian Government and that on March 16, 1898, the Brazilian Government sold them to the United States. Since Congress did not declare war on Spain until April 21, 1898, no law was violated by the sale in time of peace. The *New Orleans* (originally the *Amazonas*) left Eng-

⁶¹ British Foreign Enlistment Act, Aug. 9, 1870. 33 and 34 Vict., Chap. 90, Sec. 8; also in Deák and Jessup, *op. cit.*, p. 136. The provisions of Sec. 8 of this Act were proclaimed by the British Government in the Franco-Prussian and Spanish-American Wars, by Australia in the Russo-Japanese War, by the British again in 1922, and were reiterated in the British Admiralty Instructions of 1926. Deák and Jessup, *op. cit.*, pp. 147, 150, 163, 165, 221-2.

⁶² Deák and Jessup, *op. cit.*, p. 87 (1914); p. 95 (1933).

⁶³ *Ibid.*, p. 238 (1937).

⁶⁴ *Ibid.*, p. 387 (1904); p. 393 (1914).

⁶⁵ *Ibid.*, p. 445 (1918 and 1924).

⁶⁶ *Ibid.*, p. 482 (1938); p. 483 (1914); p. 496 (1904); p. 503 (1898).

⁶⁷ *Ibid.*, pp. 482, 572 (1938).

⁶⁸ *Ibid.*, pp. 482, 577 (1938).

⁶⁹ *Ibid.*, pp. 482, 701 (1938).

⁷⁰ *Ibid.*, pp. 482, 742. (?)

⁷¹ *Ibid.*, pp. 482, 756. (?)

⁷² *Ibid.*, p. 798 (1904); p. 804 (1914).

⁷³ *Ibid.*, pp. 482, 840 (1938).

⁷⁴ *Ibid.*, pp. 482, 970 (1938). In making this survey, the writer has been aided by the citations given in Harvard Research Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War (1939), this JOURNAL, Vol. 33, Supp., pp. 254-255. However, since, in the preparation of this Draft, no one considered it open to question that a neutral is obligated to take measures to prevent the departure of *any* war vessel for belligerent delivery, the citations there given did not distinguish between departure of war vessels armed to belligerent order and others. The writer has combed these citations since the Attorney General gave his opinion, to establish the precise point at issue.

land and reached the United States before war broke out. The *Albany* (originally the *Almirante Abreu*) was far from completion, and the British Government prohibited its delivery until after peace had been signed between Spain and the United States in December, 1898. A small torpedo boat, re-named the *Somers*, was likewise purchased from a German firm on March 26, 1898.⁷⁵

The Attorney General was able to refer to only one "precedent" for the transfer of destroyers, and, as presented in his opinion, it is somewhat misleading.⁷⁶ Keith's Wheaton says: "Germany, however, in 1904-5 permitted the sale to Russia of ocean liners belonging to its auxiliary navy, and also the exportation of torpedo boats," but adds in the next sentence that "the difficulty of distinguishing between a *bona fide* sale of a ship, and the organizing of a hostile expedition in her territory, has induced England to prohibit altogether the sale of such ships by her subjects to belligerents. This prohibition fully satisfies the requirements of Article 8 of the thirteenth Convention of the Hague (1907)."⁷⁷ Hershey notes that the liners belonged to the North German Lloyd and the Hamburg-American steamship companies, but, because the intimate relations between these companies and the German Government made the liners practically a part of the German auxiliary navy, he condemns their sale as "a serious breach of neutral obligation."⁷⁸ The sale of these liners is also condemned by Holland, who adds that by international law a neutral government is bound not to sell a belligerent "ships or munitions of war, even when the sale takes place in the ordinary course of getting rid of superfluous or obsolete equipment."⁷⁹ It seems strange that "precedents" which are easily established as serious violations of international law should be sought to justify the conduct of the United States Government.⁸⁰

⁷⁵ Annual Report of the Secretary of the Navy for 1898, pp. 4, 21-22. Cf. also F. E. Chadwick, *The Relations of the United States and Spain: The Spanish-American War* (1911), Vol. I, p. 12, n. Moore's Digest of International Law, Vol. VII, p. 861, gives the detailed story from manuscript sources in the State Department, but confuses the *Somers* with the *Albany*. One other vessel, the *Nicheroi* (*El Cid*), renamed the *Buffalo*, was purchased from the Brazilian Government on July 11, 1898, during the course of the war, but the 1898 Report of the Secretary of the Navy refers to her on May 30, 1898, as "the U. S. merchant steamer *Nicheroi*." *Op. cit.*, Appendix, pp. 51-55.

⁷⁶ For his statement, see *infra*, p. 736.

⁷⁷ Wheaton's International Law, 6th English ed. (1929, A. B. Keith), Vol. 2, pp. 977-978.

⁷⁸ A. S. Hershey, *The Essentials of International Public Law and Organization* (rev. ed., 1927), Sec. 462, n. 6. Hershey erroneously states that the vessels were sold to Japan.

⁷⁹ T. E. Holland, "Neutral Duties in a Maritime War, as Illustrated by Recent Events," *Proceedings of the British Academy*, 1905-1906, p. 56.

⁸⁰ See also an unsigned editorial (by George A. Finch), "The purchase of vessels of war in neutral countries by belligerents," this *JOURNAL*, Vol. 9 (1915), p. 177 ff.; also, L. H. Woolsey, *loc. cit.* The only evidence the writer has been able to find to support the statement in Keith's Wheaton that Germany permitted the exportation of torpedo boats to Russia during the Russo-Japanese War, is a statement in A. S. Hershey, *The International Law and*

As far as the United States is concerned, the rule against departure of war vessels with intent of belligerent delivery or use has been regarded as international law even before the Treaty of Washington.⁸¹ Moreover, the United States has ratified Hague Convention XIII and incorporated it into its municipal law.⁸² Both the Treaty of Washington and the Hague Convention, however, impose obligations only on a neutral *government*. For years United States statutory law contained inadequate provisions applicable to individuals on the point of departure of war vessels which the United States was internationally obligated to prevent, and, as Mr. Gregory said, it was his purpose in submitting what became Title V of the Act of June 15, 1917, to Congress, to correct the defects in our neutrality statutes, and to bring them into accord with our international obligations. Mr. Jackson's interpretation of Sec. 3 fails to accomplish this purpose.)

THE ATTORNEY GENERAL'S OPINION

Lest it be thought that the examination just made of the applicable principles of international law is a diversion from the issue, it should be recalled that Mr. Jackson stated that Sec. 3 must be interpreted in the light of the traditional rules of international law, and that he regarded his particular interpretation as required by those rules. He says of Sec. 3:

This section must be read in the light of Section 2 of the same act and the rules of international law which the Congress states that it was its intention to implement (H. Rep. No. 30, 65th Cong., 1st Sess., p. 9). So read, it is clear that it is inapplicable to vessels, like the over-age destroyers, which were not built, armed, equipped as, or converted into, vessels of war with the intent that they should enter the service of a belligerent. If the section were not so construed, it would render meaningless Section 2 of the act which authorizes the President to detain any armed vessel until he is satisfied that it will not engage in hostile operations before it reaches a neutral or belligerent port. The two sections are intelligible and reconcilable only if read in light of the traditional rules of international law. These are clearly stated by Oppenheim in his work on International Law, 5th ed., Vol. 2, Sec. 334, pp. 574-576; . . .

Diplomacy of the Russo-Japanese War (1906) p. 92, that a German Socialist member of the Reichstag charged, and that newspapers repeated the charge, that the German Government permitted the exportation *overland* of parts of torpedo boats, which were reported as being assembled at Libau, Russia. Hershey adds that these and similar reports "which are drawn from the newspapers, may be somewhat wanting in accuracy and authenticity," but, if true, they would indicate "a gross breach of neutrality." *Ibid.*, pp. 96-97.

⁸¹ "The United States has always looked upon the Three Rules of Washington as declaratory of international law, and as the necessary and natural consequences of the doctrine of neutrality, proclaimed and enforced by the United States since the wars of the French Revolution . . ." Bryan to Barclay, Aug. 19, 1914. U. S. For. Rel., 1914, Supp., p. 602. This was likewise our argument in the Alabama arbitration.

⁸² 36 Stat. 2415.

The Attorney General then quotes Oppenheim's hair-splitting statement that a neutral government is not obliged to prevent its subjects from selling armed vessels to belligerents as contraband, but must forbid their building them to the order of a belligerent. The Attorney General continues:

Viewed in the light of the above, I am of the opinion that this statute does prohibit the release and transfer to the British Government of the so-called "mosquito boats" now under construction for the United States Navy. If these boats were released to the British Government, it would be legally impossible for that Government to take them out of this country after their completion, since to the extent of such completion at least they would have been built, armed, or equipped with the intent, or with reasonable cause to believe, that they would enter the service of a belligerent after being sent out of the jurisdiction of the United States.

This will not be true, however, with respect to the over-age destroyers, since they were clearly not built, armed, or equipped with any such intent or with reasonable cause to believe that they would ever enter the service of a belligerent.

In this connection it has been noted that during the war between Russia and Japan in 1904 and 1905, the German Government permitted the sale to Russia of torpedo boats and also of ocean liners belonging to its auxiliary navy. See Wheaton's International Law, 6th ed. (Keith), Vol. 2, p. 977.

He concludes that there is "presidential power" to transfer the destroyers upon certification by the appropriate staff officers; that the dispatch of the torpedo boats would constitute a violation of the *statute* law of the United States, "but with that exception there is no legal obstacle to the consummation of the transaction, in accordance, of course, with the applicable provisions of the Neutrality Act as to delivery."⁸³

Several points raised by the Attorney General require examination. He states that if Sec. 3 were not construed as he has done, Sec. 2⁸⁴ would be rendered meaningless. The argument⁸⁵ seems to be that Sec. 2 authorizes, or, at least, does not forbid, the sending out of certain war vessels from the United States for delivery in a neutral or belligerent port; that all the section prohibits, in this regard, is sale or delivery to a belligerent in the United States, or on the high seas; and that if Sec. 3 were interpreted to forbid the sending out of *any* war vessel for delivery to a belligerent it would render Sec. 2 meaningless. However, even if the interpretation of Sec. 3 just mentioned is adopted, Sec. 2 still has meaning. The section does not prohibit, for ex-

⁸³ See *infra*, p. 736.

⁸⁴ The text of Sec. 2 is found above, p. 575.

⁸⁵ The Attorney General does not elaborate his thesis in detail, but this part of his opinion is obviously based—in some places almost verbatim—on the letter signed by Charles C. Burlingham, Thomas D. Thacher, George Rublee, and Dean Acheson, and published in the New York Times for Aug. 11, 1940. The writer has examined that letter in a memorandum published in the Congressional Record for Aug. 20, 1940, pp. 16136-16137.

ample, the legitimate sale or delivery of war vessels to a foreign neutral government. But the foreign neutral government or corporation may be acting as an agent of a belligerent nation within the meaning of the section. Sec. 2 permits the President to detain certain armed vessels and certain classes of unarmed vessels in suspicious cases until satisfied that the sale or delivery is not a colorable sale to neutrals as agents of belligerents.⁸⁶ Sec. 3 forbids the *sending out*; Sec. 2 authorizes detention until proof against *sale or delivery* is furnished in suspicious cases.

Attorney General Gregory stated the purpose of Sec. 2 clearly in submitting his recommendations to Congress. Sections 16 and 17 of the Penal Code then in force, he noted, were deficient in many ways:

(a) They refer only to "armed vessels" and "vessels manifestly built for warlike purposes." This is clearly not sufficiently inclusive and should be extended to vessels whether so manifestly built or whether originally built for commercial purposes and adapted later to warlike purposes;

(b) Section 17 provides for bonding only when it is probable that the vessel is intended to be employed by the owners for hostilities. It should cover cases where the owners do not intend themselves so to employ it, but do intend to sell and deliver the vessel to belligerents *after leaving port*; . . .

With a view to prevent the commission of the acts for which commission the United States Government may be responsible to a foreign Government, it seems proper in neutrality statutes to provide measures of detention until innocence of wrongful intention is proved to the satisfaction of this Government.⁸⁷

✓ As thus explained by Mr. Gregory, the purpose of Sec. 2 was to permit detention of certain vessels until proof was furnished that they would not be sold or delivered to belligerents "after leaving port", *i.e.*, not merely on the high seas but even in foreign ports. As the section was drafted, however, and as enacted by Congress, a technical loophole appears not to forbid delivery or sale in foreign ports. There is no scintilla of evidence that it was the intention of Congress to authorize or permit such a violation of our international obligations, which it was admittedly the purpose of Congress to implement. In any case, the technical flaw in Sec. 2 is cured by a proper reading of Sec. 3 as forbidding the sending out of *any* war vessel with intent of delivery to a belligerent.

✓ The "meaning" which Attorney General Jackson appears to regard as the sole purpose of Sec. 2—*i.e.*, permission to send out war vessels for delivery to a belligerent in foreign ports—is in reality a reading that Sec. 2 countenances a violation of international law. Mr. Jackson, of course, does not

⁸⁶ Cf. Professor Hyde's indication of the purpose of Sec. 2, *op. cit.*, p. 716.

⁸⁷ Annual Report of the Attorney General for 1916, p. 15. Italics added. The Sections 16 and 17 referred to are incorporated in the present United States Code, Title 18, Secs. 28 and 29. They provide for the bonding or detention of certain suspicious warlike vessels.

regard the sale as contraband or delivery abroad of such war vessels as a violation of international law, and he supports his thesis with the well-known and admittedly hair-splitting argument of Oppenheim. The practice of states, however, has overwhelmingly rejected Oppenheim's distinction since 1871,⁸⁸ and the United States Government is on record as never having accepted it.⁸⁹ Although professing to base his interpretation of Sec. 3 on the traditional rules of international law, the Attorney General ignores the solid and consistent practice of states for many decades and contends for a "rule" of international law which has for the same length of time been regarded by state practice as a violation of international law.

One further observation should be made. Not even Oppenheim contends that a neutral *government* may sell, transfer, or deliver naval vessels as contraband to a belligerent. His whole argument is that a neutral government may lawfully permit its *subjects* to sell certain armed vessels as contraband. There is absolutely no authority for the proposition that a government may lawfully engage in such a trade or make such deliveries. The details of the actual transfer of destroyers from the United States Navy to Britain have not been revealed. Whether any subterfuges have been employed to give the appearance of "legality" to the transfer and to bring the transaction within the alleged loopholes of Secs. 2 and 3 of the law of 1917, the writer does not know. However, the case seems to be covered squarely by Article 6 of Hague Convention XIII:

The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.⁹⁰

The destroyers have by now been transferred; but let no one say that it was accomplished "legally." The supplying of these vessels by the United States Government to a belligerent is a violation of our neutral status, a violation of our national law, and a violation of international law.

⁸⁸ See above, p. 581.

⁸⁹ See above, note 81.

⁹⁰ 36 Stat. 2415. Cf. Woolsey, *loc. cit.*; also Harvard Research Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, this JOURNAL, Supp., Vol. 33 (1939), p. 232 ff.

INTERNATIONAL LAW AND SOCIAL STRUCTURE

BY GERHART NIEMEYER

Assistant Professor of Politics, Princeton University

The crisis of practical international law has forced the science of international law to take stock of its most fundamental notions. Discussion is in full sway about the essence of international law, about its adequacy and its development, and about the factors conditioning its growth and effectiveness. Together with this survey of the entire phenomenon of positive international law, attempts are being made to revise the theoretical construction, the philosophy of, and the method of approach to, international law. The most persistent trend in this discussion seems to be toward a functional conception of international law. As yet there is no agreement as to the exact meaning of functionalism. Perhaps it is not even desirable to define this meaning too rigidly during this early phase of the discussion. However, one feature seems to be common to all who call themselves functionalists. They all endeavor to comprehend the structure and the sense of legal rules "within the context of social life," as one of them has put it. "International law is the function of the civilization in which it originates and . . . which, in turn, becomes a function of this same international law."¹ The principle that the contents of the law can and should be understood without reference to the factors of the social structure upon which it works, has been discarded. There is a growing conviction that "the full meaning of a legal rule is not drawn out till its career is pursued from its origin in the dictate of judge or legislator, to its actual operation."²

This type of approach poses two main questions regarding the system of international law which is on the anvil in the present crisis. On the one hand, it becomes imperative to inquire into the nature and the meaning of the inheritance that has been handed down to us by three centuries of legal theory and practice in the European States system. On the other hand, it is necessary to analyze the structure of the social reality surrounding us with a view to an adequate conception and construction of international law in this world.³ While this latter undertaking seems to be the ultimate task incumbent on this generation of scholars, a retrospective analysis of the functional relationship between international law and social structure is a

¹ H. J. Morgenthau, "Positivism, Functionalism, and International Law," this JOURNAL, Vol. 34 (1940), p. 274.

² M. J. Aronson, "Cardozo's Doctrine of Sociological Jurisprudence," Journal of Social Philosophy, Vol. IV (1938/39), p. 10.

³ Both these problems are treated by the author of this article in a book on *The Function of Politics in International Law*, to be published soon. The views presented above have been developed more elaborately in the historical chapters of this book.

prerequisite to any new construction for the future. First we must enter into an investigation of the cultural, political and economic ground on which the former building was erected. Since in social phenomena there is no such thing as a new development *ab ovo*, since the past, however obsolete, conditions each new step, a sociological study of the factors which influenced international law through three centuries is indispensable. The following observations are intended as a contribution to these preliminary steps preceding an ultimate renovation of the entire construction of international law.

POLITICAL CONDITIONS SURROUNDING THE BIRTH OF INTERNATIONAL LAW

International law covers a field of relationships which first appeared as such in the epoch of the great political reorganization of Europe: the period of consolidation of new political units in the sixteenth and seventeenth centuries. As a consequence of this process, entirely new factual situations arose, for the regulation of which no established rules were available. New norms had to be found, which developed into a whole new body of law, destined to provide order for an entire and distinct sphere of social reality. What circumstances brought this new type of relationships into existence? What conditions engendered the need for international law?

Neither Antiquity nor the Middle Ages had a body of international law in the modern sense. Greece, India and China had employed certain rules of interstate intercourse, without, however, reaching the completeness and consistency of our modern system. All that Rome knew, apart from the law applicable to its citizens, was a body of law pertaining to the non-Roman subjects of the Empire. Similarly, the medieval unity of the world admitted only of a law applicable solely to individuals, and centering in the universal authorities of Church and Empire. After the decline of these two universal powers, however, new protagonists in the struggle for political power emerged: the Estates on the one hand and the territorial princes on the other. This change produced the historical situation in which the need for a body of international law arose.

The Estates were bodies representing those forces to whom belonged, under the feudal system, the concrete means of power. Accordingly, the princes, on their part, could rule only by way of the fealty of those elements as represented in the Estates. Thus, when a situation arose in which the princes found themselves under the necessity of carrying on the struggle for political power against the Estates, they could only do so by building up their own means of power in the form of standing armies, which consisted of professional soldiers and were therefore at the disposal of the prince independently of fealty, legal titles and political interests. Professional armies, however, served the purposes of the prince only so long as he was able to pay them regularly. This led to the need for a permanent revenue, and to the introduction of regular taxes, together with the establishment of a permanent, professional and organized bureaucracy. This type of political order

turned out to be so superior to the feudal one that the example of the Italian tyrants, first rulers to employ it, was soon imitated widely. First in Spain, then in England, France, the German Electorates and other places, the central power of the prince was buttressed by a bureaucratic administration, a system of general taxation and standing armies. After Machiavelli had baptized the new phenomenon with the name "*lo Stato*" and, through the notion of a "Reason of State," had vindicated for the public entity a specific point of view as opposed to personal and private criteria, the idea of the State gradually conquered the entire theory and practice of European politics.

The characteristic feature of the new phenomenon was that it drew a line between political matters and the rest of life, that it separated public affairs, or the "State," from private relationships, or "Society." The feudal system knew of only one comprehensive social order, comprising authority, law and morality in one undifferentiated cosmos of norms. The coördination of all men in a common framework of ordered existence was then achieved by everybody's abiding by the personal duties which pertained to his status and defined his place in the social hierarchy. The ruler had the personal right to demand certain services from his vassals, the vassal had the personal obligation to render certain contributions to his superior's power. This personal and legal tie between high and low, servant and master, lord and vassal, admitted of no distinction between private and public spheres. Every person's entire individuality was linked for good and bad, for peace and war, for what he was and what he had, with the fate of those above and those below him. The new pattern of political order, on the other hand, only called for standardized contributions, to be rendered by the individual to the commonweal. Most of these limited and typified participations of private persons in public affairs were defined in terms of monetary duties. The commonwealth, in peace as well as in war, ceased to depend on the active readiness of every vassal, every feudal lord, to fulfill the obligations by which he was responsible to his superior for acts of justice, administration and warfare. Instead it now rested on the action of permanent bureaucrats, who represented the community as such, and who simply demanded from the private individual compliance with their orders, and even that only within the limits of public interest. Thus the individual obtained, apart from his duty of obedience and financial contribution, a non-political sphere in which he enjoyed the freedom of a "private" life, thanks to the "organization," *i.e.*, the separate establishment of an organizational apparatus, of public affairs. The corollary of the "depersonalized" order of public affairs, the State, was the "liberalization" of private existence: Society.

INTERSTATE LAW: LAST BEQUEST OF ROMAN UNIVERSALISM

This evolution might not have occurred had not the local consolidation of different states within the orbit of Christianity been counterbalanced by the

continuation of the Church as a common and all-pervading element. Notwithstanding the split-up of Christendom into numerous political units, the Church persisted as a common denominator, successfully maintaining its claim to domination of all individual souls. Thus, throughout the realm of occidental civilization the Church maintained a uniform standard of culture, over and against the manifold standards of political power and political interest created by the different states. In this dualism of viewpoints, that of the Church was equivalent to a standard of individual emancipation from the requirements of the respective political units, a standard which thus obtained a universal and moral validity. As long as Church and Empire coincided, at least theoretically, in the territorial range of their authority, a dualism between a private sphere of a moral and religious character, and a public sphere of a political and legal character could not arise. The only kind of conflict which was possible under the dual authority of Papacy and Empire was a struggle for competencies and supremacy within the one undifferentiated order. But as soon as the Empire dissolved itself into a plurality of local units, whose respective power interests came into conflict, and whose legal systems became centered in their respective sovereigns, the universal sphere of the Church had to segregate itself from the particular sphere of the State. When this took place, there appeared above the states, quite logically, the doctrine of absolute natural law as the corollary to the relativity of positive law, as enacted by the various states. The notion of the absolute value of the individual soul was adapted to politics in the form of the natural rights of individuals, rights which were conceived uniformly and universally throughout Christendom, in contrast to the changing requirements of political expediency and political power. These "natural" fundamental rights of man were an expression of the universal authority of the Church and its domination of individuals' private lives, which, because of the catholicism of the Church, were saved from being absorbed into the respective laws and interests of the particular states.

It is here that we have to look for the roots of modern international law. The separation of political affairs as a sphere with specific functions and specific laws of its own from the totality of social life required a legal boundary-line between the public and the private realms. Since the new order, the State, was essentially a way of administering common concerns by a staff of permanent organs, it was important to secure to these organs the monopoly of political action; and since this new and separate field of politics constituted only a sector of the whole of social life, it was necessary to determine legally how far its function extended into the private sphere of the individual.

For international law is nothing but a legal order applying to those relationships which result from the unorganized side-by-side existence of several supreme organizations of social order. The fact that rules concerning these relations were established in the shape of a uniform body of law which was binding on all Christian states, is due only to the influence of the common

Church and its spiritual universalism. It was this universal authority in things cultural and spiritual which made it possible to separate the State, as a relative and local political organization, from the community of all Christians, as an absolute and non-political universe. Without the spiritual counterbalancing of clerical Catholicism against the tendency of the new states to absorb all life into a self-sufficient territorial unit, the rise of a general Christian and European system of law would be unthinkable. The material solidarity of interests transcending state boundaries would never have been able by itself to bring forth a body of international law. Such an interdependence of interests certainly creates a need for international law, but, without a common agency to formulate and elaborate common standards, only isolated and disconnected particular rules would result from this need. A coincidence of interests does not of itself contain the practical possibility of forming a uniform system of law. This is evident by the example of the Greek city-states of antiquity. There we have a plurality of local political units with a solidarity of culture and interests similar to that which characterized the Europe of 1600. Yet, since every *polis* had its own gods, since religion was intertwined with political order in one undifferentiated system of norms, there was no absolute platform from which to see the relativity of the different states, and no common agency to formulate the rules of common values. Thus, despite the interstate solidarity, it was not possible to overcome the spiritual and religious autarkism of these city-states. Consequently, the Greek community as such never developed a uniform and consistent body of international law, but only isolated usages, treaties and settlements by arbitration, merely practical forms of interstate relations.

Accordingly, it is no mere coincidence that the first writers on international law were Dominicans and Jesuits, the banner-carriers of the Counter-Reformation. The Church, having definitely resigned its claim to temporal authority over the State, insisted energetically on its influence over the spiritual and moral domain. Through the channels of natural law, which as *ius* ranked, with absolute obligatory force, above the State and its *leges*, the Church successfully secured spiritual authority over the whole of Christian territory, under whatever political rule it happened to be.

THE EUROPEAN SOLIDARITY OF THE ESTATES

However, it may be doubtful whether the theoretical structure of the Catholic thinkers would have been sufficient to bring about the general acceptance of a system of international law had not the historical conditions of those times called for an international order as a social exigency. After all, the idea of the union of mankind, on which the Spanish jurists based their speculations, corresponded, at least in Europe, to the pattern of social and cultural reality. All countries in this area shared equally in the same system of social stratification, the hierarchy of Estates. These Estates had,

during the fourteenth century, developed into "international" groups of common interests which "everywhere disrupted and transcended the political enclosure of state territories."⁴ The great associations of cities and commercial organizations embraced the whole of Europe with their administrative agencies and their legal and economic relationships. The system of credit, of warehouses and of commercial exchanges, the institution of commercial convoys—briefly, the whole of the indispensable apparatus which had gradually grown up for the satisfaction of material needs all over the Occident, transcended the plurality of states and united them into one common commercial area.

The states as such at first merely served the need for unified military action. They had arisen as a reaction against the insecurity and disintegration of the medieval régime of feudal lords and Estates. To medieval pluralism they opposed the centralized organization of monarchic military power and supreme territorial authority. But the State at first could not, and would not, take over those functions of government which were still adequately managed by the surviving units of the medieval Estates. Such functions were, especially, production and commerce, and also science, education, transport and similar activities. The State replaced the feudal régime, but it did not provide a substitute for the latter's specifically "bourgeois" performances, even where these presupposed the existence of corporate forms of political order, possible rivals of State power. Thus the "bourgeois" aspects of social order retained a vital importance in the social structure, they supplemented the new administration of the State and could not be dispensed with for the moment.

Since the State was reluctant or unable to replace the bourgeois corporations in their social function, it followed that they had to be granted a sphere of security and non-interference in which they could operate efficiently and continuously. This condition of security and non-disturbance had to be effected on an international scale, since "bourgeois" activities were themselves international in scope and organization. Inside Europe this requirement was met for the time being by the existence of the Estates, Corporations, and quasi-military commercial unions, such as the Hansa. They formed a European community of interests which, transcending the limits of the separate states, was equipped with its own means of power and protection. The situation changed, however, when colonies and new commercial areas were acquired and were placed under the immediate sovereignty of the princes. Here the State was confronted with tasks which in Europe were still performed, not by centralized power, but by the Estates. How could the security and protection, which were indispensable for the carrying out of the specifically "bourgeois" activities of society, be achieved by the State in interstate relations? The Middle Ages did not know a system of world trade as an integral feature of the social pattern. Thus there were

⁴ H. Heller, *Staatslehre* (1934), p. 128.

no precedents, no traditional set of standards, no established norm which might secure law and order in this new field of commercial activities. Thus the task of regulating commerce, production, and traffic with the new trading areas became a function of the State. The princes began to conclude conventions concerning land and sea trade, commercial settlement in colonies, the protection and privileges of merchants, etc. The growing frequency of these problems led to the practice, among the sovereigns, of permanent representatives with each other. This again required new rules of law. For just as the new standing armies, being instruments of "public" power, had to be distinguished and separated by law from the rest of the population, so diplomats and consuls, being agents of a sovereign, had to be given a legal position corresponding to the "official" and representative character of their mission. The State, having become an independent apparatus of administration with the function of organizing social order on a territorial scale, could only be distinguished as such if its organs ceased to be conceived in a merely personal capacity, and acquired the transpersonal status of officials.

The foregoing observations on the origin of international law may be summarized by saying that international law was born in the historical situation in which the functions of government, being concentrated in territorially consolidated states, acquired an extension which called for governmental action beyond the limits of state boundaries. The economic interrelationship of European society became an object of State organization, in so far as it assumed proportions with which the still existing medieval corporations and associations could no longer cope. Inasmuch as this interrelationship transcended state boundaries, it required an international order which could only be achieved by common agreement among the different states. The fact that the sovereigns actually did succeed in setting up a body of international law, however, is due primarily to the common inheritance of a Christian and humanitarian body of values, and especially to the potent effect of Roman universalism.

THE INTERDYNASTIC FUNCTION OF *IUS GENTIUM*

What is the function of interstate law in this historical situation? To answer this question we must take a glance from still another direction at the structure of political organization in Europe. The religious wars had brought about the decisive struggle for power between the absolute central ruler and the feudal entities in most of the European nations. Consequently the center of gravity of political consolidation lay in the international struggle between the various dynasties. As yet the dynasties, and not nations as such, were the contending parties in this fight. Their conflict was still to decide the definite territorial delimitations of political power units, within which the respective states were to develop into unitary moulds of social life. This shifting of the process of political consolidation from the

internal to the external plane is most distinct in the Thirty Years' War. It started as a religious war, but during the latter half of the period it became a purely dynastic conflict which was to fix the power boundaries of the ruling families in Europe. Accordingly, it was ended not by a religious pact, a protocol of tolerance or a document of religious privileges, but by a modern peace treaty which fixed the borderlines of Europe. During this struggle of the European dynasties, the monarchic State of the absolutist brand consolidated the political organization of Europe in the form of sovereign territorial units.

An important feature in this situation was the Turkish threat, which formed a danger common to the whole of Christendom. Although Christendom no longer formed a politically united community, although some nations, like France, maintained friendships and alliances with the Eastern neighbors of the easternmost Christian countries, there was still enough consciousness of the community of cultural values and the common bond of faith left in all parts of Europe to allow a common tendency to develop in politics also. It seems highly possible that the principle of a *justum potentiae aequilibrium*, which after 1648 formed the recognized constitution of the European States system, was a product of the common front of Christendom against the onslaught of Islam.

Although no one dreamt any more of restoring the former political unity of Christendom, there survived still enough of its tradition to make people realize that Christendom could only continue to exist divided into a plurality of states, provided the independence of each one of those states formed the common interest of all. How clear this realization is to leading European minds is manifest in this formulation of Fénelon:

Neighboring states are not only obliged to treat each other according to the rules of justice and good will. They should also form a sort of society and a general commonwealth, for their own particular security as well as for the common interest. All the members composing the great body of Christendom owe each other, for the common good, and owe to themselves, for the security of their country, every effort to prevent the progress of any member from upsetting the equilibrium.⁵

This seems to be the key to the function of international law during that epoch. The fact of the division of Christendom into a multiplicity of independent territorial units had become an axiomatic certainty in the thirty years' combat of all against all. The specific social function of an autonomous political power already formed the condition *sine qua non* of social life everywhere and could no longer be dispensed with. Thus, although the absolute rulers in this process of political consolidation fought each other for the expansion of their respective realms of authority, there was yet a general agreement that these wars must not aim at the extermination of peoples nor at the destruction of the enemy state as such. The meaning of

⁵ As quoted by Dupuis, *Le Principe d'Équilibre et le Concert européen* (1909), p. 26.

these dynastic struggles was not the conquest and domination of other countries, but merely the definite delimitation of the spheres of power and authority of different dynasties. The expansion and limitation of monarchic sovereignty in a territorial sense was the objective around which war was being waged in the Europe of the seventeenth and eighteenth centuries.

In accordance with this function of war, interstate law of this epoch on the whole bore the features of an interdynastic order. Its action was not yet that of a law of "nations." Its specific functions paralleled the objectives of the "limited war" of those times. Thus, among its functions was that of preventing those excesses of war which would have gone beyond the inherent aim of the interdynastic struggle for power, such as permanent damage to the civil population and their social order. In other words, since all were tacitly agreed that no ruler would and should expect from the war he waged more than a territorial extension of his power at the expense of another dynasty, all were inclined to confine the action of combat to means sufficient for attaining this end. The concept of "nation" in the modern sense did not yet exist. The population of the territory to be conquered was looked upon as a potential part of one's own people, especially as a potential source of wealth and revenue for the crown. Consequently, the concept of war and conquest did not aim at, nor was any ruler interested in, damaging or exterminating the civil population of hostile territory.⁶ The fight was carried against the authority and the title which another ruler had in those territories, with occasional admixtures of the desire for political prestige. Therefore, the sovereigns of this period were inclined to acknowledge a set of rules which enabled them to hit the adversary in that spot and only in that spot.

This common interest of dynasties was the main bulwark of international law during the period of absolutism. Its rules concerning privateering, contraband, prize law, neutrality of ship and cargo, war and its termination, the conclusion of peace and the acquisition of territory made it possible for the will-for-power of the monarch to meet its contestant on that common plane on which their fight against each other could yield a result in the most efficient way. In other words, the interdynastic law of this epoch was essentially a common basis for the disputes of power between rulers. It regulated the relations between states and princes mainly with respect to their encounter in war and the case of armed conflict.⁷ There is no trace of any peace-creating and peace-maintaining function in the international law of absolutism, such as characterized that law in the latter part of the nineteenth and the beginning of the twentieth century. Nevertheless the political function of international law under absolutism was highly important, considering that political power, having only just become sovereign and

⁶ Cf. Fletcher Pratt, *Road to Empire* (1939), p. 68.

⁷ See Westlake, *Collected Papers* (ed. Oppenheim, 1914), p. 30 ff., especially p. 32.

autonomous, had not yet attained a definite external delimitation of its scope.

THE "THIRD ESTATE" AND THE THEORY OF INTERNATIONAL LAW

However, these positive rules of war, prize law and neutrality formed only a very fragmentary international order in the sense of a regular observance of norms by the states. They were nothing but a crystallization of certain usages which had turned out to provide an adequate framework for purely interdynastic struggles, and which as such appealed to the general consciousness of that epoch. Accordingly, there was no systematic consistency in these customary rules. Thus, for example, a general notion of neutrality was lacking. When we speak now of international law during the seventeenth century, we are thinking less of these customary rules than of the theoretical systems of Gentilis, Grotius, Zouche, Pufendorf and other thinkers. What was the rôle which their theorems played in the social and political reality of their time? What were the conditions of their effectiveness?

It is not by chance that the theorists to whom the whole modern doctrine of international law is due, all belonged to the Protestant and "bourgeois" parts of Europe, which had just won their civil liberties and their national self-determination by struggling against the Spanish kings. From the point of view of their social situation, the problem of international order and international politics had an aspect quite different from that of the Spanish jurists. Between Suarez and Grotius there was an essential difference not only in the original attitude of mind, but also in the political and social pattern of the society surrounding them. For Suarez the legal community of mankind was not a mere postulate, but a fact: it was the necessary form of being in which the notion of humanity could alone be conceived. The *corpus mysticum* of Christendom, the religious authority of the Church, the spiritual universalism of the Papal office—all this was for the Spaniards merely a description of an existing structure. It was an ontological realization of the substance of things. Accordingly, the law governing the community of mankind was also conceived as something substantial, in being, immutable. It was the universal truth about the existence of men and states. Human will in this permanent and stable order of law had the rôle only of giving effect to, not of creating, law. Legislation and contract were not sources, but reflexes of the law, temporary attributes of its ideal existence. This approach of the Spaniards corresponded to the realities prevailing in the Spanish Empire. However, it did not fit the case of the English and French kings with their absolute political and legislative will, with their sovereignty which had just been defined as *legibus soluta potestas*. North of Spain there were political organizations in which the ruler's will, emancipated not only from the ties of positive law, but also from those of religion, actually created law. The development of history favored the path

taken by the French kings and not that taken by the Spanish Empire. Therefore, the significance of Suarez lies not so much in the concrete norms of international law which he taught, but in his grandiose conception of an all-embracing law of nations as such. It is this universalistic idealism, not his practical system, which exercised a decisive influence on European thinking, while Grotius, who took up his conception in a more realistic way, became the father of most of the concrete rules of the new discipline of law.

The reason for the stronger influence which Grotius exercised on the reality of politics is that he lived in a political community of the type which just at this time was supplanting the Spanish type of State. In the sense of an emancipation of political power from the guidance of theology, the prevalence of religious goals and the ties of traditional positive law, The Netherlands represented a much more "absolute" type of State than Spain. Clearly recognizing the most effective factors in the process of political organization and consolidation, Grotius attributes to this absolute will of the State a much more autonomous rôle than Suarez. The will of the absolute State obviously operated as a creator of law. Accordingly, Grotius distinguishes between positive international law, which is of contractual origin, and the natural law of reason. The latter binds the ruler's will as an ethical commandment, but the former is the practical rule which regulates social reality by fixing rights and duties and by making people behave in a definite way. Thus, the State, having in reality monopolized the enactment and enforcement of law, is given in theory, also, the position of the fountainhead of law and legislation. On this basis the extremely important conclusion which had to be drawn for the theoretical construction of international law was that the states, by common and coincident wills, establish the positive law which is to be in force between them.

Obviously this conception of international law approximated the political pattern of most European communities more closely than the more medieval one of the Spaniards, in which the subject of legality played only an auxiliary rôle in respect to the eternal substance of universal law. For those states and rulers, who had won their power by fighting against Spain, had actually established for themselves this autonomous and emancipated power which decreed and revoked laws, established social order, and successfully claimed the legal obedience of the whole of their territories' population, recognizing as superior to itself only the principles of *ius divinum et naturale*. In these modern power states the will of the prince manifested itself daily as the true dynamic force of the legal order. The State, personified by its ruler, presented itself visibly as a law-creating and law-maintaining agent, whose autonomous power shaped the law in the form of positive and effectual rules.

On the other hand, the more "individualistic" conception of law and order which distinguished Grotius from the Spaniards, corresponded again to the social structure that surrounded him. And the eminent place which this

thinker occupies in the history of international law can, among other reasons, be also explained by realizing that the type of society in which he lived represented the social pattern which in coming centuries was to be characteristic of the whole of the Occident. Grotius wrote for a nation of merchants, traders, scientists, craftsmen—members of the "Third Estate." The core of their social existence was commerce, the core of commerce is contract. In Germany the need of the trading class for legal security and certainty had led to the adoption of Roman law, centering around the axiomatic notions of the legal person and the person's will. The class of commercial people, the professions, the crafts, could only thrive provided the political atomization of Europe, with its countless local laws, were superseded by a "uniform and written system of rules, in which each rule was systematically made to conform to the unity of the whole."⁸ The "bourgeois" way of living and working required this standardization of law as a basis of certainty and calculability of commercial relationships all over Europe.

The adoption of Roman law had occurred in the period of early capitalism and individualism. In the meantime, mercantilism had supplanted this more individualistic economy. Accordingly, the trade between nations, especially Dutch overseas trade, required the same conditions of legal certainty and calculability, which in the early capitalistic period had brought about the adoption of Roman law. State treaties now fixed the rules of commercial intercourse; but it was also necessary that treaties should be observed, that the vicissitudes of the power struggle should not constantly change the stipulated law, and that the inequality of states should not lead to disadvantages in their commercial relationships. These were the conditions under which international trade might flourish. They could be recognized especially clearly in the Dutch traders' State. And, moreover, the Dutch theorists' views about international law were bound to carry special weight in the eyes of the world. Three fourths of the world's sea trade was carried on Dutch boats; this fact explains much of the predominating influence of the Dutch jurists.

Accordingly, the theory of international law which placed the subject's will in a central position, was not only in line with the requirements and the sentiments of absolute monarchs, but also corresponded to the consciousness and legal conditions of the Third Estate and its sphere of commerce, which essentially depended on international law. This explains why the Dutch, and not the Spanish, conception of international law asserted itself in history, and why our present ideas of international law are derived from Grotius and not from the more profound Suarez.

The circumstances mentioned above also determined the real significance which the great theoretical systems proved to have in the political reality of their times. It would have been unfruitful and perhaps even impossible to develop a system of law inductively out of the loose agglomeration of hab-

⁸ H. Heller, *op. cit.*, p. 134.

its and usages. However, it was a most urgent task to set up theorems of international law, on the basis of which an international practice of law might evolve. The theory of international law in this period had the very real function of forming the link between the elaborate legal consciousness of bourgeois society, its standards of justice, its system of concepts and its need for legal certainty on the one hand, and the will of the absolute State, its specific *Raison d'Etat*, and its requirements of power positions on the other hand. In this sense it has been said that "natural law performed, in the older days, the function of a bridge between international and private law."⁹ This function was a necessary one, because the bourgeoisie, being the main source of national wealth, had a vital political importance, but did not participate in the formation of the State's will nor have any official position of political command. There was only one way by which the trading and producing Third Estate could exercise its influence on the shaping of international relations: the voice of legal science, which confronted the sovereign State with the postulates of legality, justice, morality and humanity. Through this channel the influence of the Third Estate has actually operated for two centuries as the legal commandment opposing power politics. This vital function of legal theory also explains why international law during the seventeenth and eighteenth centuries was the creation of a small group of thinkers. These circumstances, moreover, account for the fact that international law appeared, during this period, as a complete system, a consistent whole centering around the notion of the legal person, while with all other types of law the process of systematization is only the final step crowning a long development of concrete legal practices.

⁹ H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 34.

THE PANAMA CANAL IN TIME OF PEACE

BY NORMAN J. PADELFORD

Professor of International Law, Fletcher School of Law and Diplomacy

The rights secured by the United States through the conclusion of the Hay-Pauncefote Treaty and the Hay-Varilla Convention afforded the United States legal bases upon which to embark upon the excavation, construction, operation and protection of an interoceanic canal in the Isthmus of Panama.¹ They formed a foundation for the erection of a vast edifice of powers and jurisdiction over the Panama Canal, the Canal Zone, and over vessels and persons in and about the Canal.

Legislation was passed by Congress April 28, 1904, appropriating the funds required for the first payment to Panama for the rights and properties in the Isthmus,² and empowering the President to proceed to the acquisition of the lands and properties "necessary and convenient for the construction, maintenance, operation, sanitation, and protection" of the Canal and its auxiliary works. Plenary authority was vested in him for undertaking and completing the work of construction, operation, maintenance and protection, as well as for the governance and regulation of the Canal and the Canal Zone, which was thereby created as a legal entity.³ From the outset a close relationship was established between the Canal undertaking and the departments of national defense, the Isthmian Canal Commission being placed under the supervision of the Secretary of War.⁴

¹ See N. J. Padelford, "American Rights in the Panama Canal," this JOURNAL, Vol. 34 (1940), pp. 416-442.

² 33 U. S. Stat. at Large (hereafter cited as Stat.), 429. Generally speaking, all treaties, conventions, and Acts of Congress bearing upon the Panama Canal and Canal Zone, from 1901-1934, may also be found in an official publication of the Canal Administration entitled, *Treaties and Acts of Congress Relating to the Panama Canal* (Mt. Hope, 1922). Supplements cover the period from 1921-1934. Subsequent to that date, such instruments may be found in *The Canal Zone Code* (Washington, 1934), and its Supplement (Washington, 1939). This was authorized by Act of Congress, June 19, 1934, and contains "all permanent laws relating to or applying in the Canal Zone." 48 Stat. 1122. Amendments in 49 *ibid.*, 313, 1905; 50 *ibid.*, 486, 509, 750, 751; 51 *ibid.*, 779. A dispute arose between Panama and the United States Government in 1934 regarding the method of payment of the annual annuity, when the United States ordered the cessation of all payments in gold specie, and Panama refused to accept payment in dollars. *New York Times*, March 2, 3, 7, 1934. It was agreed in Art. 7 of the 1936 Treaty that the United States might pay in any coin or currency equal to 430,000 balboas in Panaman currency. U. S. Treaty Series, No. 945.

³ Legislative, executive, judicial, and protective functions were combined in and through the office of the President, who has acted through the issuance of proclamations and executive orders. See William K. Jackson, "Administration of Justice in the Canal Zone," *Virginia Law Review*, Vol. 4 (1916), p. 7.

⁴ Executive Order, May 4, 1904. Executive Orders Relating to the Panama Canal (Mt. Hope, 1922) (hereafter cited as Ex. O.), pp. 20-26. When Elihu Root became Secretary of

Ancon and Cristobal, the United States-controlled ports at the maritime ends of the Isthmus, were made ports of entry and clearance for the Canal and Canal Zone by Executive Order of June 24, 1904.⁵ The Taft Agreement of 1904 involved recognition by the Government of Panama of the right of the United States to sell fuel, supplies and stores, free of Panama taxes and duties, to vessels calling at the ports of the Canal Zone, and the non-application of tariffs of either Panama or the United States to goods entering or in transit across the Canal Zone.⁶

As the construction of the Canal approached completion, the need became apparent for a more comprehensive and permanent law concerning the Canal and Canal Zone. This was met by the Act of August 24, 1912, which provided for "the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone."⁷ It is worth noting that in both the Preamble and in Section 7 of the Act the

State in 1905, President Roosevelt contemplated placing the Canal Commission under his control, but eventually decided to leave it under the Secretary of War. P. C. Jessup, *Elihu Root* (New York, 1938), Vol. I, pp. 518-519. Mr. Jackson, who was formerly District Attorney and Judge of the District Court of the Canal Zone, says that the Order of May 4 was "always referred to in the legal work affecting the Canal Zone as the 'Canal Zone Bill of Rights.'" Jackson, *loc. cit.*, pp. 3, 4. The ordinances issued by the Isthmian Canal Commission may be found in Laws of the Canal Zone (Mt. Hope, 1922).

⁵ Ex. O., p. 26. Commissaries for the sale of commodities, supplies, and goods to persons working on or for the Canal, and to vessels calling at the Canal Zone were established at the same time (*ibid.*, p. 34 n.), and the American tariff laws were applied to goods entering the Canal Zone. These measures were protested by Panama. By the Taft Agreement, the United States agreed to restrict sales by its commissaries, to lift its tariff laws from goods entering the Zone from Panama or destined for Panama, and to use Panama postage surcharged with the mark of the Canal Zone on mails emanating from the Zone, in consideration of the lowering of Panama duties, the non-application of Panama tariffs to goods entering or passing through Panama for ultimate sale or use in the Canal Zone, and of the non-application of Panama taxes and duties to fuel or supplies sold to vessels in ports of the Canal Zone. For controversy between the Governments of Panama and the United States, see U. S. For. Rel., 1904, pp. 586-642; McCain, *op. cit.*, Ch. II. The Taft Agreement was carried out in the United States by a series of executive orders of the Secretary of War, dated Dec. 3, 6, 28, 1904, Jan. 7, 1905, Jan. 5, 1911. Ex. O., pp. 29-34, 103. The Taft Agreement did not entirely remove the difficulties between Panama and the United States. Negotiations for a new agreement were commenced in 1915, but were not pressed until 1923, when the United States abrogated the Taft Agreement. 42 Stat. 1225; 43 *ibid.*, 1952. For correspondence between Panama and the United States, see For. Rel., 1922, Vol. II, pp. 761-762; *ibid.*, 1923, Vol. II, pp. 638-687; *ibid.*, 1924, Vol. II, pp. 522-527. A treaty to replace the Taft Agreement, signed July 28, 1926, failed to come into force owing to the refusal of the National Assembly of Panama to ratify it. Cong. Rec., 69th Cong., 2d Sess., Vol. 68, pp. 1848-1852; Department of State Press Releases, Aug. 23, 1926. The matter was eventually settled by Arts. 4-5 of the General Treaty of Friendship and Cooperation of 1936.

⁶ For. Rel., 1904, pp. 640-642, 643. The orders issued in pursuance of the Taft Agreement, together with the various ordinances, laws and regulations issued by the Canal Commission, were confirmed and continued "until Congress should otherwise provide," by the Panama Canal Act of Aug. 24, 1912. 37 Stat. 560, 569.

⁷ 37 Stat. 560. This Act supplemented rather than supplanted the Act of 1904. Here for the first time the Canal was designated in law as the Panama Canal.

Canal Zone was placed in secondary and adjunctive relationship to the Canal.⁸ The President was authorized to terminate the Isthmian Canal Commission, and to complete, govern and operate the Canal and Canal Zone through a Governor of the Panama Canal.⁹ He was directed to cause the Canal "to be officially and formally opened for use and operation" upon the completion of construction.¹⁰ Section 5 of the Act, empowering the President to prescribe the tolls to be charged vessels using the Canal, precipitated the well-known tolls controversy with Great Britain, by ordaining that American vessels engaging in coastwise or intercoastal trade should not be subjected to charge.¹¹ The British Government contended that while the United States had a right unilaterally to construct, operate and protect the

⁸ In the words of Sec. 7, "The Governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone . . . which is to be held, treated, and governed as an adjunct of such Panama Canal." This relationship is in line with the purpose for which Panama granted the Zone to the United States by Art. II of the 1903 Convention: "The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal. . . ." 33 Stat. 2234-2235.

⁹ The Commission was discontinued by Executive Order of Jan. 27, 1914, which also set up the new and permanent organization. This remained, as its predecessor, under the supervision of the Secretary of War. Ex. O., pp. 155-157. Sec. 1 of Act of Sept. 21, 1922, 42 Stat. 1004, defines powers of the Governor. Below, p. 610. See Digest of Opinions of the Judge Advocate General of the Army, 1912-1930 (Washington, 1932), Sec. 2140. A memorandum accompanying the order noted that the operation of the Canal logically should be under the supervision of the Secretary of War, and stipulated that the ranking Engineer of Maintenance of the Army Engineer Corps stationed at the Canal should act as Governor of the Panama Canal in the absence or disability of the Governor. Ex. O., pp. 157-158. The present Governor, Colonel G. E. Edgerton, nominated by President Roosevelt on July 5, 1940, previously served as Engineer of Maintenance from 1936. New York Times, July 6, 1940.

¹⁰ This was necessary because of the treaty specifications that the Canal should be "opened" on the basis of certain Rules. (Art. III, Hay-Pauncefote Treaty; Art. VIII, Panama Convention.) The Canal was informally opened in August, 1914, but not formally "opened" until July, 1920. See below, pp. 610-611.

¹¹ This end was achieved by providing that vessels engaged in the coastwise trade of the United States should not be charged tolls, and by revising Sec. 4132 of the Revised Statutes, to exclude foreign owned and registered vessels from this trade.

The literature on this subject is well known and extensive. Among the more important documents and treatments bearing on the controversy are the following: "The Panama Canal," Hearings before the Committee on Interstate and Foreign Commerce, 62d Cong., 2d Sess., House Doc. No. 680 (1912); "Panama Canal Traffic and Tolls," Senate Doc. No. 575, 62d Cong., 2d Sess.; "Great Britain and the Panama Canal," Senate Doc. No. 19, 63d Cong., 1st Sess.; "Rule of Treaty Construction," Senate Doc. No. 31, 63d Cong., 1st Sess.; "Panama Canal Tolls," House Doc. No. 1313, 62d Cong., 3d Sess.; For. Rel., 1912, pp. 467-489; *ibid.*, 1913, pp. 540-549; *ibid.*, 1914, pp. 317-318; British and Foreign State Papers, Vol. 105 (1912), pp. 366-374; L. Oppenheim, *The Panama Canal Conflict between Great Britain and the United States of America* (Cambridge, 1913); C. Kennedy, "Neutralization and Equal Terms," this JOURNAL, Vol. 7 (1913), pp. 27-50; J. H. Latané, "Panama Canal Act and the British Protest," *ibid.*, pp. 17-26; E. Wambaugh, "Exemption from Panama Tolls,"

Canal, it was bound by the terms of the Hay-Pauncefote Treaty, "that the Canal should be open to British and American vessels upon terms of equal treatment."

. . . any system by which particular vessels or classes of vessels were exempted from the payment of tolls would not comply with the stipulations of the Treaty that the Canal should be opened on terms of entire equality, and that the charges should be just and equitable. . . . His Majesty's Government have no desire to place upon the Hay-Pauncefote Treaty an interpretation which would impose upon the United States any restriction from which other nations are free, or reserve to such other nations any privilege which is denied to the United States. Equal treatment, as specified in the Treaty, is all they claim.¹²

Making much of the fact that the British protest was made before any tolls had been collected from British vessels from which American vessels were exempt, Secretary of State Knox argued:

It is the improper exercise of a power and not its possession which alone can give rise to an international cause of action. . . . When, and if, complaint is made by Great Britain that the effect of the Act and the Proclamation together will be to subject British vessels as a matter of fact to inequality of treatment, or to unjust and inequitable tolls in conflict with the terms of the Hay-Pauncefote Treaty, the question will then be raised as to whether the United States is bound by the Treaty both to take into account and to collect tolls from American vessels, and also whether under the obligations of that Treaty British vessels are entitled to equality of treatment in all respects with the vessels of the United States.¹³

ibid., pp. 233-244; papers on the question, American Society of International Law, Proceedings, 1913; Admiral C. H. Stockton, "Panama Canal Tolls," U. S. Naval Institute Proceedings, Vol. 38 (1912), pp. 493-499; T. Baty, "Panama Tolls Question," Yale Law Journal, Vol. 23 (1914), pp. 389-396; E. Root, Addresses on International Subjects (Cambridge, 1916), pp. 175-313; P. Bunau-Varilla, Panama (New York, 1920), pp. 505-527; Jessup, Elihu Root, *op. cit.*, Vol. II, pp. 262-269.

Executive Order, dated Nov. 13, 1912, prescribed tolls to be charged various classes of vessels. Ex. O., pp. 131-132. Rules of admeasurement contained in Executive Order of Nov. 21, 1913. Ex. O., p. 154. Regulations *re* payment of tolls, Executive Order of April 16, 1914. *Ibid.*, p. 172. See also Act of Aug. 24, 1937, for measurement of vessels using the Panama Canal (50 Stat. 750); and Proclamation No. 2247 of Aug. 25, 1937, prescribing new toll rates (Federal Register, Vol. 2, pp. 1764-1765); Proclamation No. 2248, Aug. 25, 1937, prescribing rules for measurement of vessels (*ibid.*, pp. 1765-1774).

A preliminary protest was lodged with the Government in Washington by the British Chargé, while the Act was still pending. For. Rel., 1912, pp. 469-471.

Professor Jessup, in his biography of Elihu Root, reveals that in a Cabinet meeting, July 17, 1912, while the Panama Canal Act was still pending, Root opposed the exemption clause in Sec. 5. The exemption was defended and supported by President Taft, Secretary of State Knox, Secretary of War Stimson and Attorney General Wickersham. Jessup, *op. cit.*, Vol. II, p. 264.

¹² For. Rel., 1912, pp. 481, 486.

¹³ *Ibid.*, 1913, pp. 540-547. Mr. Knox asserted that Congress could, of course, "violate the terms of the Hay-Pauncefote Treaty in its aspect as a rule of municipal law," or empower the President to do so.

Holding that the mere conferring by Congress of power to fix tolls at a lower rate for American vessels, even if they were engaged in coastwise trade, amounted to a denial of the right of equality of treatment to British shipping, and was therefore inconsistent with the treaty, Ambassador Bryce nevertheless urged that the interests of both countries required that the issue be settled amicably, "by means which will leave no ground for regrets or complaints," and before the Canal was actually opened.¹⁴

Influential persons in the United States, including officials of the Panama Canal, early advocated suspension or repeal of the tolls exemption clause.¹⁵ President Wilson, at length, came out in favor of the latter course in a message to Congress on March 5, 1914. Repeal was advocated on grounds of justice, wisdom, and policy. The exemption, he maintained,

. . . constitutes a mistaken economic policy from every point of view, and is, moreover, in plain contravention of the treaty with Great Britain. . . . The large thing to do is the only thing we can afford to do, a voluntary withdrawal from a position everywhere questioned and misunderstood. We ought to reverse our action without raising the question whether we were right or wrong. . . .¹⁶

The bill as finally passed and approved by the President on June 15, 1914,

¹⁴ For. Rel., 1913, pp. 547-549.

¹⁵ See Report of the Superintendent of the Marine Division of the Canal, Annual Report of the Governor of the Panama Canal for the Year ending June 30, 1915 (Washington, 1915), pp. 218-221; C. L. Jones, *Caribbean Interests of the United States* (New York, 1916), p. 214. Elihu Root was one of the foremost protagonists of repeal. He believed in the trusteeship of the United States regarding the Canal and responsibility for the observance of the treaty. Jessup, *op. cit.*, Vol. II, p. 262. See also forceful arguments of Admiral Stockton, U. S. Naval Institute Proceedings, *op. cit.*, pp. 493-499.

¹⁶ House Doc. No. 813, 63d Cong., 2d Sess.; For. Rel., 1914, p. 317. President Wilson was aided by the strong stand which Senator Root had taken on the issue as early as Jan. 21, 1913. R. S. Baker, *Woodrow Wilson, Life and Letters*, Vol. IV (New York, 1931), pp. 398-400. After an informal meeting in New York at which Root and Choate were present, Mr. Wilson decided Jan. 24, 1913, to advocate repeal. *Ibid.*, p. 400; Jessup, *op. cit.*, Vol. II, pp. 264-265; C. Seymour, *The Intimate Papers of Colonel House*, Vol. I (Cambridge, 1926), p. 193. However, he allowed the question to remain in a semi-active condition for a year after taking office, partly because of the platform adopted by the Democratic Convention which had nominated him, which had favored exemption for American vessels, and partly because of the opposition known to exist to repeal in the Senate. Baker, *op. cit.*, pp. 396-400. Writing to Mr. E. F. Baldwin of the Outlook, June 8, 1914, Senator Root said: "The main thing I have been contending for in the Tolls Repeal controversy is that we should not acquire rights upon the Isthmus upon one theory, stated by Mr. Roosevelt, and having got them, hold them on the contrary theory, stated by Mr. Taft. I have no doubt that we were both morally and legally right in what we did, but on Mr. Taft's theory of our own title to our rights, we were not morally right." Jessup, *op. cit.*, Vol. II, p. 266. The British Government accepted suggestions made by Colonel House and Ambassador Page that they refrain from pressing the issue. *Ibid.*, p. 403; Seymour, *op. cit.*, pp. 202-203. Mr. Wilson finally decided to push matters after a talk with Colonel House on Jan. 21, 1914. Seymour, *op. cit.*, p. 204. For further review of the fight for passage of the Repeal Act, see Baker, *op. cit.*, pp. 406-418.

repealed the exemption clause of the 1912 Act, but carried a reservation added by the Senate which provided:

That the passage of this Act shall not be construed or held as a waiver or relinquishment of any right the United States may have under the treaty with Great Britain, . . . or the treaty with the Republic of Panama . . . to discriminate in favor of its vessels by exempting the vessels of the United States or its citizens from the payment of tolls for passage through said Canal, or as in any way waiving, impairing, or affecting any right of the United States under said treaties, or otherwise, with respect to the sovereignty over or the ownership, control, and management of said Canal and the regulation of the conditions or charges of traffic through the same.¹⁷

Notwithstanding the proviso added by the Senate, from the opening of the Canal to commerce on August 15, 1914, vessels of American ownership and registry were charged tolls and dues upon the same basis as the vessels of all other nations.

In addition to authorizing the President to fix the Canal tolls, Section 5 of the 1912 Act conferred power on the President to issue and to amend

regulations governing the operation of the Panama Canal, and the passage and control of vessels through the same or any part thereof, including the locks and approaches thereto, and all rules and regulations affecting pilots and pilotage in the Canal or the approaches thereto through the adjacent waters.

The power to make and enforce such regulations is essential to the maintenance, operation, and protection of the Canal. It is recognized in Article II of the Hay-Pauncefote Treaty and in Article II of the Convention with Panama. It is necessary in peace and indispensable in time of emergency or war. The power is limited only by the prescription that the Canal shall be "open" to the vessels of all nations, that there shall be no discrimination in the terms or administration of the regulations, and that the regulations shall be "just and equitable." As will be seen presently from an examination of the Regulations, Executive Orders, and practice, the United States has in fact assumed far-reaching jurisdiction over domestic and foreign vessels entering and passing through the Panama Canal.¹⁸

The Government commissaries established in 1904, whose sales and activities became the ground for controversy between the Governments of Panama

¹⁷ 38 Stat. 385. For Congressional action in passing the bill, see Cong. Rec., Vol. 51, pp. 10076, 10077, 10211-10247, 10274. Members of the British Government expressed pleasure and satisfaction at the manner in which President Wilson had carried through the repeal. Baker, *op. cit.*, pp. 419-420; Seymour, *op. cit.*, p. 206.

Vessels passing through the Canal to Balboa and return, for the sole purpose of having repairs made at the docks and shops there, were exempted from payment of tolls by Order of President Harding, Nov. 17, 1921. Ex. O., p. 292.

¹⁸ The first set of Rules and Regulations for the Operation and Navigation of the Panama Canal and Approaches Thereto, was issued on July 9, 1914. Ex. O., pp. 178-193. The Rules may also be found in this JOURNAL, Vol. 10 (1916), Supp., p. 27 *et seq.* See p. 611 below, for detailed treatment of Rules.

and the United States until 1939,¹⁹ were given a legislative foundation by Section 6 of the Panama Canal Act. This also authorized the development of docks, yards, repair shops, warehouses and other needful equipment for the maintenance and operation of the Canal, and the servicing and supplying of vessels. The primary purpose of such facilities, to be operated "through the Panama Railroad Company, or otherwise," was to supply, provision and repair United States Government vessels. "Incidentally," other "passing vessels" might also be supplied by these services at reasonable prices.²⁰

We have already seen that by Section 5 of the 1912 Act provision was made for regulating vessels in the Canal. What about persons near the Canal and aboard vessels within the confines of the Canal? Was an equal measure of control set up? Section 8 gave the District Court jurisdiction "of all felony cases, of offences arising under Section 10 of this Act, all causes in equity; admiralty and all cases at law involving principal sums exceeding three hundred dollars. . . ." ²¹ Section 10 entitled the Governor, after the completion and opening for operation of the Canal, to make "such rules and regulations, . . . touching the right of any person to remain upon or pass over any part of the Canal Zone as may be necessary." Furthermore, it was made "unlawful for any person, by any means or in any way, to injure or obstruct, any part of the Panama Canal or the locks thereof or the approaches thereto." ²² The first part of Section 10 seems to refer, offhand,

¹⁹ See note 5, *supra*.

²⁰ The Government of Panama contended that the grant of the Canal Zone never envisaged using the Canal Zone for such commercial transactions, and that Panama merchants and concerns were deprived of a lucrative business. See correspondence between Minister Alfaro and Secretary of State Hughes in 1923. For. Rel., 1923, Vol. II, pp. 638-675. The issue was resolved, in part at least, by the negotiations for and the terms of the General Treaty of Friendship and Coöperation of March 2, 1936. By Art. 3 the United States agreed to limit its own commercial activities, and to restrict the establishment of new firms in the Canal Zone likely to injure the economic interests of the Republic. It agreed not to hinder vessels making use of Panaman ports adjacent to the Canal, and undertook to allow Panaman merchants to sell to ships entering Canal waters. U. S. Treaty Series, No. 945. See also exchanges of notes.

²¹ Amended by Act of Sept. 21, 1922. 42 Stat. 1004.

²² The section merits quotation in full:

"Sec. 10. That after the Panama Canal shall have been completed and opened for operation the governor of the Panama Canal shall have the right to make such rules and regulations, subject to the approval of the President, touching the right of any person to remain upon or pass over any part of the Canal Zone as may be necessary. Any person violating any of such rules or regulations shall be guilty of a misdemeanor, and on conviction in the District Court of the Canal Zone shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding a year, or both, in the discretion of the court. It shall be unlawful for any person, by any means or in any way, to injure or obstruct, or attempt to injure or obstruct, any part of the Panama Canal or the locks thereof or the approaches thereto. Any person violating this provision shall be guilty of a felony, and on conviction in the District Court of the Canal Zone shall be punished by a fine not exceeding ten thousand dollars or by imprisonment not exceeding twenty years, or both, in the discretion of the court. If the act shall cause the death of any person within a year and a day thereafter, the person so convicted shall be guilty of murder and shall be punished accordingly."

to persons on land within the Canal Zone, or in the airspace above it, rather than to persons aboard ship in the Canal. The second part of the section unquestionably covers persons on board ship who may cause injuries or obstructions, or who attempt to commit the same, to the Canal and its locks and approaches. The fact that the rules regarding remaining upon or passing over the Canal Zone were to be promulgated after the opening of the Canal would seem to create such a direct relationship with the operation of the Canal as to include jurisdiction over persons on board vessels in the Canal. There is no clause in Section 8 limiting the jurisdiction of the District Court to the Canal Zone as distinct from the Canal. Indeed, its admiralty powers would normally, under American law, include persons on board vessels in territorial waters.²³ Any remaining doubt as to the applicability of laws and rules to persons on board vessels in the Canal was removed by the Act of August 21, 1916.²⁴

Section 11 of the 1912 Act closed the Canal to vessels operated by railway companies or in violation of the anti-trust laws of the United States, and gave the Interstate Commerce Commission power to determine questions

²³ See Sec. 2 of Act of Sept. 21, 1922, amending Sec. 8 expressly providing that the jurisdiction in admiralty shall be the same as is exercised by the United States District Judges and the United States District Court, and that practice and procedure shall be the same as in the United States District Courts. 42 Stat. 1004. See G. H. Robinson, *Handbook of Admiralty Law in the United States* (St. Paul, 1939), pp. 20-22, 234-238; Draft Convention on Territorial Waters, Harvard Research in International Law (this JOURNAL, Vol. 23 (1929), Spl. Supp., p. 243 *et seq.*), comment on Arts. 15-16, 18; P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York, 1927), pp. 144-207.

The dictum of the United States Supreme Court in the *Wildenhuis* case is well known, but deserving of repetition in connection with the problem at hand as it relates to the Panama Canal:

"... by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace and dignity of the country or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged, as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment if the local tribunals see fit to assert their authority." 120 U. S. 1, 12. Cf. *Cunard v. Mellon*, 262 U. S. 100, 124. See "Criminal Jurisdiction over Foreign Merchant Ships," *Tulane Law Review*, Vol. 10 (1935), p. 13, for review of subject.

²⁴ See below, p. 624. A search of the Reports of the District Court throws little further evidence upon the subject, for the cases reported are few and essentially on other questions. In *Government v. Flannery and Lorenz*, it was held that under the National Prohibition Law, Canal Zone police could board a Navy cutter in Canal Zone waters, seize liquor and arrest the person in charge. *Canal Zone Reports*, Vol. III, pp. 595, 601. In denying the right of a policeman to break into a cabin of a steward on a ship, without the consent of the master, and without a warrant, and there to seize narcotics to use as evidence for conviction of the defendant, the Court in *U. S. v. Almoguera*, did not deny the right to board vessels, seize goods, or arrest persons if provided with a proper warrant. *Ibid.*, pp. 401, 404.

as to competition, routes and rates. No endeavor seems to have been made to apply these conditions to foreign vessels passing through the Canal.²⁵

Section 13 is one of the most important parts of the Act, dealing, as it does, with times of emergency or war. It provided:

That in time of war in which the United States shall be engaged, or when, in the opinion of the President, war is imminent, such officer of the Army as the President may designate shall, upon the order of the President, assume and have exclusive authority and jurisdiction over the operation of the Panama Canal and all of its adjuncts, appendants, and appurtenances, including the entire control and government of the Canal Zone, and during a continuance of such condition the Governor of the Panama Canal shall, in all respects and particulars as to the operation of such Panama Canal, and all duties, matters and transactions affecting the Canal Zone, be subject to the order and direction of such officer of the Army.²⁶

This safeguard is a natural corollary of the relationship established from the outset between the Panama Canal and the United States War Department. Although it might be assumed that the Governor of the Panama Canal, customarily an officer of the Army and, by Executive Order, under the supervision of the Secretary of War, would cooperate wholeheartedly with the local Commandant in time of crisis, the presence of two ranking officials of government, each charged with duties and functions overlapping the other (the one charged with the operation and maintenance of the Canal, the other with the task of commanding military forces and taking measures for the protection of the Canal and of the personnel), might conceivably produce duplication of effort, friction and jealousy sufficient to weaken the proper protection of the Canal. This section is essential for producing centralized command commensurate with the task of defending this vital, strategic possession. It is the most effective way of insuring the necessary freedom and rapidity of action for the military; of providing that full power

²⁵ No objection is on record against the assumption advanced by the British Government that this section is not applicable to British vessels. For. Rel., 1912, p. 488. Sec. 12, extending the extradition laws and treaties of the United States to the Canal Zone, applies more particularly to the Zone than to the Canal, and hence requires no treatment here, as our concern is with the Canal *per se*. The United States has maintained that its jurisdiction over fugitive criminals found in the Canal Zone is complete, and that foreign states desiring to obtain such persons must apply directly to the authorities of the United States, and not to Panama, for extradition. For. Rel., 1923, Vol. II, pp. 704-710. Sec. 11 was modified by the Intercoastal Shipping Act, 1933. 47 Stat. 1425. This Act required all common carriers engaged in intercoastal commerce to file rates, charges, etc., with the United States Shipping Board.

²⁶ 37 Stat. 560, 569. Under an Executive Order of May 17, 1916, which is still in force, the Governor may call upon the military for assistance in the performance of his functions and duties in connection with the Canal and Canal Zone. Ex. O., p. 214. An opinion rendered by the Judge Advocate General of the Army has held that the commanding officer of the Army, Panama Canal Department, may not be vested by the President with power to proclaim martial law. Digest of Opinions, Sec. 2141.

shall be in the hands of the Commandant to establish such rules as may be necessary to control the movements and activities of subjects and aliens. The authority has been used twice; in 1917-1919, and again in 1939-1940.²⁷

The passage of the Panama Canal Act completed the working-out of the general structure of government and administration of the Canal and Canal Zone.²⁸ Experience during the ensuing years has testified to the foresight and judgment of those responsible for this law. While many additional powers have been vested in the Canal officials and in the armed forces protecting the Canal, no fundamental change has been found necessary as yet in the political and administrative set-up fashioned in 1912.²⁹ The Act pointed the direction to be taken in operating, maintaining, protecting, and caring for the sanitation of the Canal. The powers conferred by the Act have been amplified to meet new situations and to profit from experience. There has been no departure from the general plan outlined by this Act.

The powers of the Governor were elaborated and clarified in 1922 by an Act which laid down

That the Governor of the Panama Canal shall, in connection with the operation of such Canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided, all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the Governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law.³⁰

The treaties with Great Britain and with Panama, as well as the 1912 Act, provided for the application of the treaty Rules forming the "basis of the neutralization" of the Canal, and the exercise of rights and duties estab-

²⁷ This will be discussed in a subsequent issue of this JOURNAL.

²⁸ In *McConaughey v. Morrow*, the District Court in the Canal Zone held that the Canal Zone Government is statutory and not constitutional, and that the Constitution of the United States as a rule does not apply thereto, except in so far as directed by Congress. The plenary power of Congress was recognized, as well as the *ad hoc* powers of the President. "An examination of this Act (1912) discloses the fact that while Congress reserves the right to modify existing rules and regulations, or to create new ones, there is nevertheless conferred upon the President, in reality, the entire management and control of the operation and government of the Canal and the Canal Zone, and all subsidiary agencies. . . . A careful examination of the whole case has convinced the Court that Congress not only conferred, but intended to confer, upon the President an unrestricted power of supervision, involving judgment, decision and discrimination, with respect to the entire Canal project and that the Courts can exercise no discretion thereover." Canal Zone Reports, Vol. III, pp. 377, 381, 382, 394. See also *Government v. Flannery and Lorenz*, *ibid.*, p. 599. See Sec. 1 of Act of Sept. 21, 1922, *cit. supra*.

²⁹ Attention may be called, however, to Sec. 1 of the Act of Sept. 21, 1922, referred to above and below.

³⁰ Sec. 1, Act of Sept. 21, 1922. 42 Stat. 1004. The Governor may call upon the commanding officer of the Army stationed in the Canal Zone for aid in the execution of his duties of control. Executive Order No. 2382, May 17, 1916, *loc. cit.*

lished by law upon the "opening" of the Panama Canal. The first commercial vessel to pass through the Canal was the Panama Railroad Company S.S. *Ancon*, which made the transit on August 15, 1914.³¹ This marked the informal opening of the Canal to navigation, and the application in fact of the treaty Rules and the requirements of law to vessels passing through the Canal. The original plan to hold a formal "opening" of the Canal, in the autumn of 1914, was postponed on account of the interruptions to traffic by the landslides, and the existence of war in Europe.³² Throughout the war, vessels were permitted to pass through the Canal under careful supervision and control. The Canal was formally opened "for use and operation in conformity with the laws of the United States" by Presidential Proclamation on July 12, 1920.³³ As from this date, the Rules contained in Article III of the Hay-Pauncefote Treaty were unquestionably in force, and the status of the Canal clearly fixed.

Rules and Regulations for the Operation and Navigation of the Panama Canal and the Approaches Thereto, authorized in principle by Section 4 of the Panama Canal Act, were issued on July 9, 1914, a month before vessels first navigated the Canal.³⁴ Revisions and additions have been made from time to time, and navigation today is governed by Rules issued September 25, 1925. These Rules provide the municipal law basis upon which vessels enter, pass through, and are granted final clearance from the Canal.³⁵

After entering the limits of the Panama Canal,³⁶ that is to say, a

³¹ Annual Report, *op. cit.*, 1915, pp. 33-34. A trial trip was made by the S.S. *Cristobal* on Aug. 3, 1914. Slides caused a closing of the Canal from Oct. 14-20, 31-Nov. 4, 1914, March 4-10, Sept. 4-9, and from Sept. 18, 1915, to April 15, 1916. *Ibid.*, 1915, p. 34; 1916, p. 23.

³² It was felt in official circles in Washington that the United States might be freer in its control and use of the Canal during the war if the Canal were not formally opened, and thus unquestionably subject to the Rules of the Hay-Pauncefote Treaty.

³³ Ex. O., p. 274; Annual Report, *op. cit.*, 1920, p. 1. This was deemed a fulfillment of Sec. 4 of the Panama Canal Act. Practice during the war will be discussed in an article appearing in a subsequent issue of this JOURNAL.

³⁴ Executive Order No. 1990. Ex. O., pp. 178-193; also found in Annual Report, *op. cit.*, 1915, pp. 521-538; this JOURNAL, Vol. 10 (1916), Supp., p. 27 *et seq.*

³⁵ Revisions and additions were introduced by Proclamation of Nov. 13, 1914, 38 Stat. 2039; Proclamation of May 23, 1917, 40 *ibid.*, 1667; Executive Order of Dec. 20, 1923, Ex. O., Supp. No. 3, p. 339; Executive Order No. 4314, Sept. 25, 1925, *ibid.*, Supp. No. 10, p. 382; Executive Order No. 7813, Feb. 14, 1938, Federal Register, Vol. 3, p. 383; Governor's Regulations regarding ship's papers and other matters, June 13, 1939, *ibid.*, Vol. 4, p. 2914; Governor's Order of Oct. 3, 1939, regarding health and quarantine, *ibid.*, p. 4171; Executive Order No. 8417, May 22, 1940, regarding excluded persons, *ibid.*, Vol. 5, p. 1943. Use of the Canal at the present time is governed by the 1925 Orders as amended, the contents of which will be noted below.

³⁶ See Executive Order No. 2692, of Aug. 27, 1917, establishing Defensive Sea Areas off the terminals of the Canal, into which vessels might enter only upon permission from patrol authorities. Ex. O., pp. 227-229. See succeeding article for discussion of these areas. The 1917 Area remained in force until the issuance of Executive Order of Jan. 25, 1919. *Ibid.*, p. 251.

point three marine miles from the terminals of the Canal proper,³⁷ a vessel becomes subject to the Port Captain and other Canal officials, and may proceed into the Canal, or onto the high seas, only after obtaining express permission, or clearance.³⁸ Under the Proclamations and Orders governing passage and control of vessels in time of national emergency, or of war in which the United States is a neutral, public vessels of belligerent and neutral nations may be permitted to pass through the Canal only after the commanding officer has given written assurance that the Rules and Regulations will be faithfully observed.³⁹ During such times private vessels may be inspected; may have an armed guard placed on board while in the jurisdiction of the Canal, and be further subjected to local jurisdiction to the extent that the Canal authorities may "take full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by the Canal authorities to go or remain on board thereof during such passage."⁴⁰ When the United States was at war in 1917-1921, vessels of enemies of the United States, or of an ally of such enemy, were, by proclamation, to be allowed to use the Canal and the territorial waters of the Canal Zone only with the consent of the Canal authorities and subject to such regulations as they might prescribe.⁴¹

³⁷ Art. 2 of the Convention with Panama.

³⁸ Rules 3, 4, 10, 11 of July, 1914, Rules; Secs. 3, 4, 15, 34, 240 of 1923 Transit and Harbor Regulations; Rules 3, 4, 13 of 1925 Rules. Distinction is to be made between entering and clearing from the Panama Canal, and entering and clearing from the ports of the Canal Zone on the Canal, i.e., Cristobal and Balboa. Vessels do not enter and clear from these ports unless they discharge or take on cargo there. Coming alongside at these ports for fuel and supplies, or landing passengers temporarily while the vessel is awaiting transit, does not involve stopping at the ports in a sense requiring entry and clearance therefrom. Panama Canal Record, Vol. 8 (1914-1915), pp. 41, 296.

³⁹ The Nov. 13, 1914, Proclamation, Rule 3, required such an undertaking from the commanding officers of war vessels of belligerents, as well as of vessels, whether belligerent or neutral, whether armed or not, employed by a belligerent Power as transports or fleet auxiliaries or in any way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea. Ex. O., p. 203. Same provision, excepting vessels of war of the United States, in Rule 3 of May 23, 1917, Proclamation, *ibid.*, pp. 224, 225. The Executive Order of Sept. 5, 1939, added the requirement that such written assurance be given by the commanding officer of any "public vessel of a belligerent or neutral nation." Federal Register, Vol. 4, p. 3823.

⁴⁰ This extensive power was first authorized when the United States was a belligerent, by Sec. I of Title II of the Act of June 15, 1917. 40 Stat. 240. The Act permitted such action whenever the President should have proclaimed the existence of a national emergency. This was put into effect by Executive Order No. 2907, July 9, 1918, Ex. O., p. 240. See also Executive Order of May 28, 1918, *ibid.*, p. 239. Neutral vessels approaching the Canal were "thoroughly" examined on and after May 8, 1917. MS. Department of State. It was put into force, for the second time, in the form and language quoted above, by Executive Order No. 8234, of Sept. 5, 1939. Federal Register, Vol. 4, p. 3823.

⁴¹ Proclamation No. 1371 of May 23, 1917, Rule 15. Ex. O., p. 224. So far as can be ascertained, no enemy vessels were granted passage through the Canal while the United States was engaged in hostilities with Germany. The records of vessels transiting the Canal

Permission to proceed into and through the Canal is treated as a "privilege," and accorded only after the Canal authorities have examined all of the papers of the ship;⁴² satisfied themselves that the ship does not require quarantining;⁴³ that there is nothing about the ship, its hull, machinery, or cargo which might "endanger the structures pertaining to the Canal, or which might render the vessel liable to obstruct the Canal";⁴⁴ that there are no unsettled claims or disputes involving violation of the laws of the United States, or the Canal Zone, or the Rules and Regulations regarding

do show that in April and May, 1917, six "German" vessels passed through. Annual Report, *op. cit.*, 1917, pp. 126-127. These vessels, however, had been seized by the United States Government prior to their transit, but American registers had not been issued for them at that time. *Ibid.*, 1918, p. 137. German vessels first passed through the Panama Canal in January, 1920, albeit the state of war between the United States and Germany had not yet been officially terminated. *Ibid.*, 1920, pp. 113-114.

In drawing up the Proclamation of May 23, 1917, Secretary Lansing, in a letter to the Secretary of War, dated April 13, 1917, argued that the general rules referring to war vessels and auxiliaries should not apply to our "enemies or their allies, on the ground that while the Canal is yet in the process of construction and has not been officially opened to the world, and by virtue of the fact that the United States is solely responsible for the protection, operation, and control of the Canal, the vessels of the enemies of the country should not be allowed to endanger the safety and usefulness of this great waterway." MS. Department of State. In the light of this letter, attention may be called to the exact phraseology employed in Rule 15 of the Proclamation:

"In the interest of the protection of the Canal while the United States is a belligerent no vessel of war, auxiliary vessel, or private vessel of an enemy of the United States, or an ally of such enemy shall be allowed to use the Panama Canal nor the territorial waters of the Canal Zone for any purpose save with the consent of the Canal authorities and subject to such rules and regulations as they may prescribe." Ex. O., p. 226.

⁴² Per Governor's Regulations of June 13, 1939, these include: (1) Ship Information Sheet; (2) Clearance from last port; (3) Bill of health; (4) Quarantine declaration; (5) All other certificates of a sanitary nature; (6) Passenger List (4 copies), except in case of troop and contract labor ships; (7) Descriptive list of Chinese on board (2 copies); (8) Crew List (2 copies), except for warships; (9) Store List; (10) Cargo declaration (Panama Canal form), or complete manifest; (11) Manifest of local cargo (3 copies); (12) Declaration of explosive cargo carried; (13) Declaration of inflammable or combustible liquids in bulk carried as cargo; (14) Statement of fuel account; (15) Panama Canal tonnage certificate; (16) National Register; (17) General arrangement, plan of vessel; (18) Report of structural changes since last transit. Federal Register, Vol. 4, p. 2914. Rule 12 of the 1925 Rules allows the Governor to prescribe the delivery of other papers or information. Ex. O., Supp. No. 10, p. 383. Failure to have cargo completely manifested, or to carry non-listed ship's stores exposes the goods to seizure and forfeiture, and the master to penalty under the Customs Laws. Rules 145-150 of the 1925 Rules, *ibid.*, pp. 397-398.

⁴³ Executive Order of March 31, 1920, Establishing Maritime Quarantine Regulations for the Canal Zone. Ex. O., p. 268. Superseded, and now governed by Ch. VIII of 1925 Rules Governing Navigation of the Panama Canal. *Ibid.*, Supp. No. 10, pp. 382, 392-395. Pratique without inspection is authorized by Rule 109 of the latter, for naval vessels, and, by Rule 110, at the discretion of the chief quarantine officer, for other vessels.

⁴⁴ Rules 4-7 of July, 1914, Rules and Regulations, *ibid.*, p. 178; Secs. 3-6 of 1923 Regulations, *ibid.*, Supp. No. 3, p. 340; Rule 3 of 1925 Rules, *ibid.*, Supp. No. 10, p. 382.

the Panama Canal.⁴⁶ Extra care has always been exercised over vessels carrying explosives, and special permission required for their passage through the Canal.⁴⁶ A vessel may be held until it has been put into condition, in the opinion of the Canal authorities, to make it safe for passage through the Canal.⁴⁷ The dispatch of vessels through the Canal is determined exclusively by the Canal authorities, and in such order as they may see fit.⁴⁸ From the moment a vessel receives permission to proceed into and through the Canal, until it clears the Canal waters beyond the opposite terminal, it must navigate according to the rules and regulations of navigation,⁴⁹ and under the direction of a Canal pilot, who, while not in full charge of the vessel excepting in the locks, may require the master to navigate according to his directions.⁵⁰ Failure to follow the pilot's directions resulting in any accident damaging any vessel or property or blocking the Canal may cause the holding of both master and vessel until full settlement shall have been made.⁵¹ While within Canal waters, radio stations on ships are required

⁴⁶ Rule 10 of 1914 Rules, *ibid.*, p. 179; Sec. 15 of 1923 Regulations, *ibid.*, Supp. No. 3, p. 340; Rule 4 of 1925 Rules, *ibid.*, Supp. No. 10, p. 382. The 1923 Regulations contained a section (No. 16) forbidding unauthorized possession or transportation of intoxicating liquors in the Canal Zone in violation of the National Prohibition Act. This was not applicable, however, to the "transportation of intoxicating liquors in transit by vessels." Ex. O., Supp. No. 3, p. 341. See below, p. 620, for discussion of application of liquor laws to vessels in the Canal.

⁴⁶ Rules 4, 5, 7 of 1914 Rules, *cit. supra.*; Secs. 4, 5 of 1923 Regulations, *cit. supra.* Sec. 4 of the 1923 Regulations likewise required special permission for vessels carrying volatile crude oil products. The 1925 Rules rest upon the general proposition that the Canal authorities may deny passage to vessels whose cargo might endanger the Canal or its structures. Rule 3, *cit. supra.* See also Additional Regulations prescribed by Governor, June 13, 1939. Federal Register, Vol. 4, p. 2914.

⁴⁷ Rules 4 and 6 of 1914 Rules, Secs. 3 and 6 of 1923 Regulations, Rule 4 of 1925 Rules. The Rules and Regulations specify that no claim for damages shall be admitted on account of such temporary delay of the vessel.

⁴⁸ Rule 9 of 1914 Rules, Rule 12 of November, 1914, Proclamation, Ex. O., pp. 203, 204; Sec. 13 of 1923 Regulations; Rule 5 of 1925 Rules.

⁴⁹ Rules 27-39, 54-55, 63-201 of 1914 Rules; Secs. 30-182 of 1923 Regulations; Rules 31-88, 177-180 of 1925 Rules. Rules 4-14 of the Nov. 13, 1914, Proclamation, and 4-13, and 15 of the May 23, 1917, Proclamation additionally governed the entrance, passage, and sojourn of belligerent war vessels during the 1914-1918 hostilities. Proclamation No. 2350 of Sept. 5, 1939, Prescribing Regulations Concerning Neutrality in the Canal Zone, and Executive Order No. 8234, of Sept. 5, 1939, Prescribing Regulations Governing the Passage and Control of Vessels through the Panama Canal in any War in which the United States is Neutral, govern the entrance, passage and sojourn of belligerent and neutral vessels, public and private, in addition to the 1925 Rules, during the present war.

⁵⁰ Rules 11-26 of 1914 Rules; Secs. 17-29 of 1923 Regulations; Rules 26-30 of 1925 Rules.

⁵¹ Rule No. 30 of the 1925 Rules states:

"The pilot is to be considered on board solely in an advisory capacity, but the master of a vessel must obey all the rules and regulations of the Canal as interpreted by the pilot. The pilot shall be consulted freely at all times, to insure safety in navigation, and no master, officer, nor other person connected with the vessel shall give or cause to be given any order concerning the movement of the vessel without the knowledge of the pilot; or against his

to operate on low power, to handle all ship-to-ship, or ship-to-foreign shore traffic via the United States Naval Radio Stations located along the Canal, and to cease entirely all operation when directed by these stations, regardless of whether they may be in the midst of transmitting a message.⁵²

Violation of the Rules and Regulations, and damages caused by vessels in Canal waters may lead to a variety of penalties and actions. Violation of any part of the Rules may result in a fine or imprisonment, or both, of any person or persons charged with responsibility of observing the Rules.⁵³ Damage caused to any other vessel or to Canal property of any kind may lead to holding the person in charge responsible, and in the issuance of legal process against the damaging vessel for the satisfaction of such loss or damage.⁵⁴ Persons injuring, obstructing, or attempting to injure or obstruct, any part of the Canal, or its locks or approaches, may be charged with the commission of a felony and, on conviction, punished severely.⁵⁵ If

advice. In case the master, officer, or other person connected with the vessel disregards or fails to obtain the advice of the pilot and an accident occurs which damages his own or another vessel or Canal property of any kind, or endangers or blocks the Canal, he will be held strictly responsible; and the vessel may be held by legal process until settlement in full shall have been made to cover any loss or damage that may have resulted in consequence thereof." Ex. O., Supp. No. 10, p. 385.

⁵² Rules 40-51 of the 1914 Rules; Rule 14 of Nov. 13, 1914, Neutrality Proclamation; Rule 12 of May 23, 1917, Proclamation; Secs. 240-250 of 1923 Regulations; Rules 171-176 of 1925 Rules. Proclamation No. 2350 of Sept. 5, 1939, Prescribing Regulations Concerning Neutrality in the Canal Zone, and Executive Order No. 8234 of the same date, Prescribing Regulations Governing the Passage and Control of Vessels through the Panama Canal in any War in which the United States is Neutral (the latter Regulations being in addition to the Rules and Regulations of 1925), contain no reference to radio. This remains, therefore, governed by the 1925 Rules. The Rules leave no room for special status for radio transmitters aboard warships or other public vessels of foreign states. The radios of all vessels and all radio messages emanating from vessels in the Canal waters, are submitted to the control of the radio shore stations.

⁵³ Rule 2 of the 1925 Rules ordains a fine not exceeding \$100, or imprisonment in jail not exceeding 30 days, or both. The 1914 Rules (Rule 2) had made the violation a misdemeanor, punishable by a fine not to exceed \$500, or imprisonment not to exceed 6 months, or both. This was reduced to the present terms in Sec. 2 of the 1923 Regulations. The 1925 Rules incorporate chapters concerning Quarantine, Exclusion of Undesirables, and Customs, all taken from the current laws on those subjects, each of which entail separate penalties. See Ex. O., Supp. No. 10, pp. 393, 395, 397-398. These subjects are treated separately here, and will be discussed below.

⁵⁴ Rules 99, 101 of 1925 Rules; Rule 61 of 1914 Rules; see also Governor's Circular No. 720. Settlement may be between parties out of court, or in admiralty in the District Court of the Canal Zone. By Sec. 5, paragraph 4, of the Panama Canal Act, 1912, the Panama Canal assumes responsibility for injury to vessels, cargo, or passengers, due to accidents caused by passage of a vessel through the locks, provided the vessel has complied with all the Rules and Regulations on Navigation, and any regulations issued by the Governor. 37 Stat. 560, 563; Rules 57-61 of 1914 Rules; Secs. 232-239 of 1923 Regulations; Rules 89-101 of 1925 Rules.

⁵⁵ Sec. 10 of Act of Aug. 21, 1916, authorizes punishment by fine not exceeding \$10,000, or by imprisonment not exceeding 20 years or both. 39 Stat. 527; reproduced in Rule 93 of 1925 Rules, Ex. O., Supp. No. 10, p. 392.

the action involves the violation of any regulations issued by the President or Governor of the Panama Canal acting in time of a proclaimed national emergency, the vessel may be seized and forfeited to the United States, and the person guilty of the action punished by severe fine, or imprisonment, or both.⁵⁶

The various Rules and Regulations noted above exemplify the far-reaching jurisdiction of the United States over the vessels of all nations using the Canal. Nevertheless, they represent but a part of the picture as a whole. Fortunately for the efficient management and control of navigation of the Canal, the matter of regulation has been left by Congress largely in the hands of the President and his appointees in the Canal Zone, with the result that it has been possible to revise the Rules and Regulations expeditiously and in time to meet new situations. Reference to Congress has been necessary only for the mandate to exercise extraordinary powers over vessels in time of emergency or war, and for matters other than those relating exclusively to navigation.

Notwithstanding the elaborate Rules and Regulations regarding navigation, and the other extensive provisions of law applicable to vessels at the Canal, steamship companies and masters have remarked on the promptness with which the administration functions, the readiness with which needs are met, and the comparative lack of red tape. This may be explained on the ground that "from the opening of the Canal it has been a primary policy to handle ships quickly, to avoid delay and confusion, and to require of them no more compliance with formalities than is essential to safety, quarantine protection, and accurate business conduct."^{56a}

A customs service was first established for the Canal Zone in 1904.⁵⁷ No direct authorization for the application of the United States Customs Service and laws to vessels entering the Panama Canal was contained in the Panama Canal Act of 1912, nor in any other law prior to the opening of the Canal. Such power, however, might have been inferred from the general authority conferred upon the President to "govern, and operate the Panama Canal."⁵⁸ Without specifying the source of authority, President Wilson, in an Executive Order of August 8, 1914, laid down orders and penalties relating to the Customs Service applicable to vessels of all nations arriving at the Canal Zone.⁵⁹ The order made no mention of vessels arriving for the sole purpose of transit of the Canal, as distinct from vessels arriving for the purpose of discharging and taking on cargo at one of the ports. It was applied to ves-

⁵⁶ Secs. 1-2 of Title II of Act of June 15, 1917, 40 Stat. 217, 220; Executive Order No. 2907, July 9, 1918, Ex. O., p. 240; Proclamation No. 2352, Sept. 8, 1939, Federal Register, Vol. 4, p. 3851.

^{56a} Panama Canal Record, Vol. 10 (1916-1917), p. 463.

⁵⁷ Order of Secretary of War, June 24, 1904, *supra*, note 5, Ex. O., pp. 26-27. See Secs. 35-38 of Act No. 8 of the Isthmian Canal Commission, Laws of the Canal Zone, *op. cit.*, p. 61.

⁵⁸ Sec. 4, Panama Canal Act, 37 Stat. 560, 561.

⁵⁹ Ex. O., p. 195.

sels belonging to both categories. Penalties were ordained for: (1) failure or refusal to produce manifests, or a true account of the vessel's destination; (2) having on board merchandise not included in the manifest; (3) having on board sea stores not mentioned on the sea stores list of the ship; (4) violation of any of the customs laws applicable to, or customs regulations established for the Canal Zone by the Governor of the Panama Canal.⁶⁰ The 1904 and 1914 Orders were superseded by Chapter XI of the Rules Governing the Navigation of the Canal, of September 25, 1925,⁶¹ which incorporated the substance of the previous orders, with the addition of sections conferring powers of search, seizure and arrest upon customs officers, prohibiting smuggling, and regulating the shipment of articles from the Canal Zone to the United States.⁶² Statutory foundation was finally placed beneath the Canal Zone Customs Service and the rules relating to customs, by Act of Congress of February 16, 1933.⁶³ Disagreements regarding smuggling from the Canal Zone into Panama, and concerning the imposition of duties on goods destined for Panama, were removed by the 1936 General Treaty, by which Panama and the United States agreed to coöperate to reduce smuggling, to recognize the right of Panama to impose duties and taxes on goods and persons entering Panama, and to permit the establishment of Panaman customs houses, with Panaman officials, in ports of the Canal Zone for the examination of goods and persons destined for Panama.⁶⁴

From the beginning of its interest in the Isthmian Canal Route, the United States has been concerned with questions of health and sanitation both within the zone of land set apart for the Canal and regarding vessels calling at the Canal Zone. Article II of the Canal Convention assured the United States that one of the purposes for which the Zone was acquired was that of the sanitation of the Canal, and care was taken that the terms of the convention should contain phraseology which would give the United States adequate

⁶⁰ Penalties were a fine not exceeding \$500 for Nos. 1 and 4; fine equal to value of merchandise not manifested, and forfeiture of same, for No. 2; fine for treble the value of goods omitted from sea store list, together with forfeiture of the same. (These orders and penalties reproduced, so far as they went, the law then in force respecting such matters in continental United States.) Additional regulations were issued by the Governor in Series 679 of the Governor's Circulars.

⁶¹ Ex. O., Supp. No. 10, pp. 397-398.

⁶² Rules 145, 146, 153. Rules 142-144 established the customs district, ports of entry, and Bureau of Customs to enforce the rules and regulations; Rule 147 made it unlawful to pass a fraudulent invoice; Rule 148 authorized seizure of goods smuggled or brought in under false invoice; Rules 150, 160 carried on the 1914 provisions regarding articles not manifested, and non-listed sea stores; Rule 151 provided for fee service; Rule 152 empowered a shipping commissioner to carry out the laws relating to merchant seamen; finally, the penalty clause (Rule 154) added to the monetary fine of the 1914 Order the possibility of 90 days in prison.

⁶³ 47 Stat. 813.

⁶⁴ Arts. 4-5, U. S. Treaty Series, No. 945. Act of July 10, 1937, 50 Stat. 509, amended the penalty for entering articles without approval, or for passing false invoices or bills, to \$100 fine, or 30 days' imprisonment, or both.

jurisdiction and authority in such matters.⁶⁵ Permission to take measures for sanitation in the territory outside the Canal Zone was granted by Decree of the President of Panama on December 6, 1904, and thenceforward sanitation and quarantine activities took place in Colon and Panama City.⁶⁶

Maritime Quarantine Regulations for vessels using the Panama Canal were contained in an early Act of the Isthmian Canal Commission, which remained in force until 1917,⁶⁷ when a set of regulations, authorized by Executive Order in 1913, and especially designed for Canal traffic, was brought into effect.⁶⁸ New, but similar, regulations were issued in 1920,⁶⁹ and subsequently incorporated in the Navigation Rules of 1925.⁷⁰ Under the various regulations, vessels clearing from any foreign or American port for the Canal Zone ports, for the ports of Panama and Colon, or "for passage through the Panama Canal," are required to obtain from the proper author-

⁶⁵ 33 Stat. 2234. Arts. 4, 6, 7, 9, and 13 of the convention contain provisions regarding sanitation.

⁶⁶ Arranged by Taft Agreement. See Sec. 6 of Executive Order of Dec. 3, 1904, Ex. O., pp. 29-31, and note 48 on p. 30 therein.

⁶⁷ Act No. 10, Sept. 2, 1904, Laws of the Canal Zone, *op. cit.*, p. 86. These were intended for the ports and harbors of the Canal Zone, but differed only in detail from the general principles embodied in the fuller Regulations of 1913.

⁶⁸ Executive Order No. 1761, April 15, 1913, Ex. O., p. 143. These Regulations did not come into force sooner because Sec. 36 provided that they should take effect from and after the date upon which the Panama Canal "is officially and formally opened for use and operation; by proclamation of the President of the United States." The Regulations, slightly amended (by Executive Orders Nos. 1761, 2020, and 2118, of April 15, 1913, Aug. 14, 1914, and Jan. 11, 1915, respectively [Ex. O., pp. 143, 197, 206]), were reenacted and made effective by Executive Order No. 2527, of Feb. 6, 1917. *Ibid.*, pp. 220, 222.

The 1913 Regulations prescribed the forms for bills of health to be procured by vessels, inspection requirements for vessels and passengers. By Sec. 31, a certificate of compliance with the quarantine regulations was required as a prerequisite to customs entry "or passage through the Panama Canal." *Ibid.*, p. 149. Sec. 33 directed the Governor of the Panama Canal to issue such additional rules as he might deem necessary from time to time. These are contained in Series 626 of the Governor's Circulars.

⁶⁹ Executive Order of March 31, 1920, *ibid.*, p. 268. Secs. II, III, IV of this Order made it somewhat clearer that the regulations were applicable to vessels touching at Canal waters for the sole purpose of passing through the Canal. *E.g.*, Sec. II provided:

"Masters of vessels clearing from any foreign port or from any port in the possessions or other dependencies of the United States, or touching at any of the said ports, for a port in the Canal Zone or for the port of Panama or Colon, Republic of Panama, or for passage through the Panama Canal, must obtain a bill of health in duplicate form from the officer or officers authorized by the quarantine laws and regulations in the United States, to sign such certificates for vessels entering the ports of the United States." Ex. O., pp. 268-269. Further rules were added by Governor's Regulations of June 13, 1939. Federal Register, Vol. 4, p. 2914.

⁷⁰ Ch. VIII, *ibid.*, Supp. No. 10, pp. 382, 392-395. The 1925 Rules contain innovations by way of pratique without inspection for naval vessels (Rule 109), and, at the discretion of the chief quarantine officer, for other vessels (Rule 110). In the latter instance this is to be accorded only after advising in advance by radio the names of ports visited in port 10 days, assurance that there is no sickness on board, and stating that the vessel intends "to transit the Canal without taking on or landing either cargo or persons." *Ibid.*, pp. 393-394.

ities at such ports of clearance, bills of health as stipulated by the laws of the United States to be presented to the quarantine officers of the Canal Administration. Inspection of vessels and persons follows immediately upon arrival at quarantine at the Canal terminals, unless free pratique without inspection has been given by the chief quarantine officer.⁷¹ Vessels are permitted to enter the Canal, or to clear from the jurisdiction only after obtaining a certificate from this officer.

The extensive nature of American jurisdiction over vessels making use of the Panama Canal is also revealed in the measures concerning the carriage of prohibited goods and of undesirable or excluded persons. Various laws and orders have curbed the carriage or possession of narcotic drugs, alcoholic liquors, firearms, as well as the exportation of certain commodities in time of war or neutrality. Likewise, the transportation of persons not desired in the Canal Zone, and of Oriental laborers has been curbed.

Seven months prior to the opening of the Canal, Congress forbade the admission of smoking-opium into the United States, or "into any territory under the control or jurisdiction thereof, for transportation to another country. . . ." ⁷² This made unlawful not only the entry of smoking-opium into the Canal Zone, but also the mere carriage of such opium in sea stores or in cargoes of vessels touching at the Zone or passing through the Canal.⁷³ The carriage of opium, coca leaves, their derivatives and products, as cargo was not prohibited to common carriers engaged in transporting such drugs, but its possession by any person not registered with American authorities as an importer, manufacturer or dealer, was made unlawful, and subject to seizure and punishment.⁷⁴ The Narcotic Drugs Import and Export Act of May 26, 1922, made the legal position of enforcement officers somewhat clearer.⁷⁵ It made it unlawful "to import or *bring* any narcotic drugs" into the jurisdiction of the United States, save under such regulations and permission as might be given by the narcotics authorities. While the law recognized the right of a vessel arriving at a port under the jurisdiction of the United States to have narcotic drugs in its cargo, if properly manifested, it opened the way for searches of all vessels by providing that "a narcotic drug that is found upon a vessel arriving . . . and is not shown upon the vessel's manifest, or that is landed from any such vessel without a permit first obtained from the collector of customs for that purpose, shall be seized, forfeited, and disposed of . . ." and the master penalized.⁷⁶

⁷¹ See note 70.

⁷² 38 Stat. 275.

⁷³ D. H. Smith, *The Panama Canal* (Baltimore, 1927), p. 151.

⁷⁴ Act of Dec. 17, 1914, 38 Stat. 785, Secs. 2, 4, 8. Registration was required in the Canal Zone. See Executive Order No. 2142, March 1, 1915, Ex. O., p. 210. Registration and taxation provisions amended by Title X of Revenue Act of Feb. 24, 1919, 40 Stat. 1057, 1126, 1130-1132; also by Act of Feb. 26, 1926, 44 Stat. 97. See U. S. Code, Title 26, Secs. 1040-1055, 1383-1391; Canal Zone Code, pp. 969-981.

⁷⁵ 42 Stat. 595.

⁷⁶ Sec. 8. The penalty was made \$25 an ounce in cases of smoking-opium, and equal to the value of the goods if other narcotics. The penalty constitutes a lien upon the vessel,

Only one case appears in the published Reports of the District Court in the Canal Zone concerning the enforcement of the narcotics law on board vessels in the Canal. In *United States v. Almoguera*, the court did not deny the right to board vessels to search for narcotics unlawfully present, but it did deny the right of an officer to break into a cabin of a steward without the consent of the master and without a warrant, and there to seize narcotics to use as evidence for the conviction of the defendant.⁷⁷

The National Prohibition Act made it illegal to introduce into, sell, give away, dispose of, transport, or "have in one's possession or under one's control within the Canal Zone, any . . . liquors," except for religious, scientific and medical purposes.⁷⁸ This was construed to involve prohibition of possession or transportation of liquor in the territorial waters of the Canal Zone generally,⁷⁹ but the Act expressly provided that the prohibition "shall not apply to liquor in transit through the Panama Canal."⁸⁰ Notwithstanding this provision, uncertainty prevailed for some time concerning the right to sell and possess liquor on board ships while within Canal waters. An opinion rendered by the Attorney General of the United States concluded that the prohibition was absolute with respect to vessels under the flag of the United States wherever located, and that it applied to all transport and sale of liquor on board foreign vessels within the territorial waters of the United States, save the Panama Canal.⁸¹ In response to an inquiry from the British Government concerning the constitutionality of the exception

enforceable by proceedings by libel in rem, and clearance of the vessel may be withheld pending payment of the penalty (Sec. 8b). Sec. 2c provides a punishment of fine up to \$5,000, and imprisonment not exceeding 10 years, for any individual who fraudulently or knowingly "imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals . . . such narcotic drug. . . ." Whenever, on trial for violation of Sec. 2c, the defendant is shown to have or have had possession of the drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains to the satisfaction of the jury (Sec. 2f). A master of a vessel is not liable to penalty or punishment "if he satisfies the jury that he had no knowledge of and used due diligence to prevent the presence of the narcotic drug in or on such vessel . . . but the narcotic drug shall be seized, forfeited, and disposed of . . ." (Sec. 2g).

⁷⁷ Canal Zone Reports, Vol. III, pp. 401, 404.

⁷⁸ 41 Stat. 305, 322. Cf. supplemental Act of Nov. 23, 1921, 42 Stat. 222.

⁷⁹ In *Government v. Flannery and Lorenz*, the District Court upheld the boarding of a naval cutter in Canal Zone waters other than the Canal proper, for the seizure of liquor and the arrest of persons on board having liquor in their possession. Canal Zone Reports, Vol. III, pp. 595-601.

⁸⁰ Title III, Sec. 20, par. 1.

⁸¹ 33 Ops. Atty. Gen., pp. 335-352. On Oct. 6, 1922, the President ordered the U. S. Shipping Board to enforce the ruling on all ships under the American flag. For. Rel., 1922, Vol. I, p. 577. Oct. 14, 1922, the Secretary of Treasury issued instructions to the effect that the Prohibition Law was applicable to all foreign vessels coming within the territorial waters of the United States, excepting vessels passing through the Panama Canal and not touching any other port under the jurisdiction of the United States. *Ibid.*, p. 580.

concerning the Panama Canal, Secretary of State Hughes expressed the belief that the exception had been "fully recognized" by the Supreme Court in the decision in the *Cunard S.S. Co. v. Mellon* case.⁸² To clarify the rights and privileges of the United States and of foreign vessels, the United States entered into the well-known Liquor Conventions with various countries, one article of each of which referred specifically to the Canal. Article 3 of the Convention of January 23, 1924, with Great Britain is typical:

No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, or its territories or possessions or passing through the territorial waters thereto, *and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters* and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.⁸³

After the conclusion of these conventions and until the termination of the Prohibition Act and the repeal of the Eighteenth Amendment,⁸⁴ foreign

⁸² For. Rel., 1923, Vol. I, pp. 213-214, 216; 262 U. S. 100, 127-129. The court said that the exception regarding the Panama Canal "does not discriminate between domestic and foreign ships, but applies to all liquor in transit through the Canal, whether on domestic or foreign ships." The court continued:

"Much has been said at the bar and in the briefs about the Canal Zone exception, and various deductions are sought to be drawn from it respecting the applicability of the Act elsewhere. Of course the exception shows that Congress, for reasons appealing to its judgment, has refrained from attaching any penalty or forfeiture to the transportation of liquor while 'in transit through the Panama Canal or on the Panama Railroad.' Beyond this it has no bearing here, save as it serves best to show that where in other provisions no exception is made in respect of merchant ships, either domestic or foreign, within the waters of the United States, none is intended.

"Examining the Act as a whole, we think it shows very plainly, first that it is intended to be operative throughout the territorial limits of the United States, with the single exception stated in the Canal Zone provision; secondly, that it is not intended to apply to domestic vessels when outside the territorial waters of the United States, and thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal exception provides otherwise."

⁸³ 43 Stat. 1761. Italics inserted. Similar provisions were written into the conventions for the same purpose with Germany, May 19, 1924 (*ibid.*, 1815); Sweden, May 22, 1924 (*ibid.*, 1830); Norway, May 24, 1924 (*ibid.*, 1772); Denmark, May 29, 1924 (*ibid.*, 1809); Italy, June 3, 1924 (*ibid.*, 1844); and The Netherlands, Aug. 21, 1924 (44 Stat. 2013). A convention consonant with the terms of the other agreements was signed by the United States and Panama on May 14, 1932, and proclaimed in effect April 7, 1933. 48 Stat. 1488. An Act of Congress of July 5, 1932, amended Sec. 20 of the National Prohibition Act to conform to the terms of this convention. 47 Stat. 579.

⁸⁴ Executive Order No. 5888, July 16, 1932, effected abrogation of the law. Ex. O., Supp. No. 22, p. 440. See also Act of June 19, 1934 (48 Stat. 1116), authorizing the President to make rules and regulations respecting alcoholic beverages in the Canal Zone, and regula-

vessels had to close their bars and place all liquor under lock from the time the vessel came within three marine miles of the terminal of entrance until it passed an equal distance beyond the terminal of exit of the Canal.

✓ The special relationship between the Republic of Panama and the Canal Zone, and the characteristics of their respective territorial waters made the insertion of somewhat different terms a necessity in the Convention with Panama.⁸⁵ While generally following the other conventions, this provided that the rights of boarding and search specified in Article 2 of the other conventions "shall not be exercised in waters adjacent to territorial waters of the Canal Zone."⁸⁶

The presence of explosives and firearms in the vicinity of the Canal has always, and properly, been a matter of concern to the Canal authorities. The Rules and Regulations governing Navigation of the Canal and its approaches have always prohibited the discharge of "firearms of any kind . . . from vessels while in Canal Zone Waters," excepting salutes by war vessels in terminal ports.⁸⁷ Although no case appears on record, it may be presumed that any use or discharge of arms or weapons on board a vessel in the Canal would be considered as affecting the peace of the Canal Zone, and come within the jurisdiction of the District Court by virtue of Section 8 of the Panama Canal Act. Should the use of such arms or weapons injure or obstruct, or be used in an attempt to injure or obstruct the Canal, such action manifestly would come within the terms of Section 10 of that Act, and as such would be punishable by a fine not exceeding ten thousand dollars or by imprisonment not exceeding twenty years, or both.⁸⁸ Apprehension

tions issued by Secretary of War Dern July 18, 1934, making it lawful to possess and transport alcoholic beverages in the Canal Zone. Ex. O., Supp. No. 28, p. 470. See also Executive Order No. 6997, March 25, 1935, *ibid.*, p. 477.

⁸⁵ A Memorandum from the Chief of the Division of Latin American Affairs to the Secretary of State, May 28, 1924, reporting a conversation with the Panama Minister, points out that certain waters three miles from the Canal Zone limits are within the territorial waters of Panama. The Minister suggested that an arrangement be reached which would not prejudice the carriage of liquor within the territorial waters of Panama. For. Rel., 1924, Vol. I, p. 192.

⁸⁶ 43 Stat. 1875. At the time of signing, Secretary Hughes addressed a note to the Minister of Panama stating that the signing of this convention would not affect the inclusion in a new general treaty under negotiation of an article in this form:

"It is agreed that no penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vehicles or persons by reason of the carriage of such liquors when they are transported under seal and under certificate from Panama authorities from terminal ports of the Canal to the cities of Panama and Colon and between those cities and any other point of the Republic and between any two points of the territory of the Republic when in either case the direct or natural means of communication is through Canal Zone territory and provided that such liquors remain under said seal and certificate while they are passing through Canal Zone territory." For. Rel., 1924, Vol. I, p. 196.

⁸⁷ Sec. 54 of 1914 Rules, Ex. O., p. 182; Sec. 55 of 1923 Regulations, *ibid.*, p. 344; Rule No. 6 of 1925 Rules, *ibid.*, p. 383.

⁸⁸ Continued by Sec. 10 of Act of Aug. 21, 1916, 39 Stat. 527.

over the possibility that explosives and firearms concealed on board unfriendly vessels might be used to harm the Canal has led the United States, in time of national emergency and of war abroad, to examine suspected vessels thoroughly before permitting transit, to place and station armed guards at vital points on board such vessels throughout their transit, and even to require the master, members of the crew, and any persons or passengers on the vessel to debark and cross the Isthmus by rail, under guard or supervision, while the ship is passed through the Canal under the complete control and operation of Canal engineers.⁸⁹ Vessels of enemies of the United States theoretically may be allowed transit, but only after compliance with such rules and regulations as the Governor of the Canal may prescribe. In fact, no vessels of this latter category have ever passed through the Canal under their own management during the period of hostilities in which the United States was a belligerent.⁹⁰

The supervision of the entry and carriage of certain designated goods through the Canal has found a counterpart in the exclusion and regulation of undesirable persons. This was recognized from an early date as having an important bearing upon the activities of the United States in the Canal Zone.⁹¹ It has already been noted that Section 10 of the Panama Canal Act entitled the Governor, "after the Panama Canal shall have been completed and opened for operation," to make "such rules and regulations . . . touch-

⁸⁹ Public vessels are exempt from such treatment, but are permitted to enter the Canal only after the master has given formal written assurance that all Rules relating to navigation and use of the Canal will be faithfully observed. Rule 3, Neutrality Proclamation of Nov. 13, 1914, Ex. O., p. 203; Sec. 1, Title II, Act of June 15, 1917, 40 Stat. 217; Executive Order No. 8243, of Sept. 5, 1939, Prescribing Regulations Governing the Passage and Control of Vessels through the Panama Canal in any War in which the United States is Neutral, Federal Register, Vol. 4, p. 3823. This subject will be treated in a succeeding issue of this JOURNAL. An Executive Order of March 6, 1920, made it unlawful for anyone in the Canal Zone to carry on or about his person any weapon or firearm without a permit, except persons in the authorized services of the United States. Ex. O., p. 267; revised by Act of July 5, 1932, 47 Stat. 573.

⁹⁰ Rule 15 of Rules and Regulations for the Regulation, Management, and Protection of the Panama Canal, May 23, 1917, Ex. O., p. 224.

⁹¹ Letter of the President placing the Isthmian Canal Commission under the Secretary of War, May 9, 1904, Ex. O., pp. 20, 23:

"The commission shall have power to exclude from time to time from the Canal Zone and other places on the isthmus, over which the United States has jurisdiction, persons of the following classes who were not actually domiciled within the zone on the 26th day of February, 1904, viz.: Idiots, the insane, epileptics, paupers, criminals, professional beggars, persons afflicted with loathsome or dangerous contagious diseases, those who have been convicted of felony, anarchists, those whose purpose it is to incite insurrection and others whose presence it is believed by the commission would tend to create public disorder, endanger the public health, or in any manner impede the prosecution of the work of opening the canal, and may cause any and all such newly-arrived persons or those alien to the zone to be expelled and deported from the territory controlled by the United States. . . ."

This general formula was followed in subsequent laws and orders. An Executive Order of Jan. 9, 1908, provided fines for allowing Chinese to escape in the Canal Zone. *Ibid.*, p. 75.

ing the right of any person to remain upon or pass over any part of the Canal Zone as may be necessary,"⁹² and the opinion has been expressed that this extended to persons on board vessels in the waters of the Canal and its approaches. Any uncertainty on this score was removed with the enactment of the law of August 21, 1916, which gave the President discretionary power to make and enforce rules concerning the right of any person to enter, remain upon, or pass over any part of the Canal Zone, to detain violators and return them to the countries from which they proceeded to the Canal Zone, and to punish persons committing unlawful breaches of the peace, those engaging in disorderly conduct, or who injure or obstruct, or attempt to do the same, the Canal or its locks or approaches.⁹³ Pursuant to this statute, orders were issued by the President and by the Governor excluding various classes of undesirable persons, and Chinese. Such classes of persons were made to include any "whose presence, in the judgment of the Governor, would tend to create public disorder or in any manner impede the prosecution of the work of opening the Canal, or its maintenance, operation, sanitation, and protection," and the Governor was empowered to expel and deport any such

⁹² *Supra*, pp. 607-608.

⁹³ 39 Stat. 527, Secs. 4 and 10. Sec. 4 provided:

"That it shall be unlawful to commit any breach of the peace or engage in or permit any disorderly, indecent, or immoral conduct in the Canal Zone. The President is authorized to enforce this provision by making rules and regulations to assert and exercise the police power in the Canal Zone, or for any portion or division thereof, and he may amend or change any such regulation now existing or hereafter made."

An Executive Order of Jan. 9, 1908, had made breaches of the peace and disorderly conduct misdemeanors. Ex. O., p. 74; governed by the Canal Zone Penal Code, Title XIV, Secs. 280-293.

Section 10 of the 1916 Act provided:

"The President is hereby authorized to make rules and regulations and to alter or amend the same from time to time, touching the right of any person to enter or remain upon or pass over any part of the Canal Zone; for the detention of any person entering the Canal Zone in violation of such rules and regulations, and return of such person to the country whence he or she came, on the vessel bringing such persons to the Canal Zone, or any other vessel belonging to the same owner or interest, and at the expense of such owner or interest; and in addition to the punishment prescribed by this section for violation of any such rules and regulations, the authorities of the Canal Zone may withhold the clearance of such vessel from any port in the Canal Zone until any fine imposed and the cost of maintenance of such person are paid. Any person violating any of such rules or regulations shall be guilty of a misdemeanor, and on conviction in the district court of the Canal Zone shall be punished by a fine not exceeding \$500 or by imprisonment not exceeding a year, or both in the discretion of the court. It shall be unlawful for any person, by any means or in any way to injure or obstruct or attempt to injure or obstruct, any part of the Panama Canal or the locks thereof or the approaches thereto. Any person violating this provision shall be guilty of a felony, and on conviction in the district court of the Canal Zone, shall be punished by a fine not exceeding \$10,000 or by imprisonment not exceeding twenty years, or both, in the discretion of the court. If the act shall cause the death of any person within a year and a day thereafter, the person so convicted shall be guilty of murder and shall be punished accordingly."

persons from the jurisdiction of the Canal Zone.^{93a} This was a broad and flexible classification, but it was needed in order to cope with emergencies which might easily arise in time of war or peace, and which might have serious consequences for the safety of the Canal and of vessels passing through it, should the Governor not have ample power to act summarily and as discretion indicated. The owners, officers and agents of vessels bringing such persons into Canal Zone waters were made responsible for preventing their landing without permission, and for carrying them back to their ports of embarkation, if so ordered by the Canal Zone officials.⁹⁴

^{93a} See Executive Order No. 8417, May 22, 1940, containing most recent listing of persons subject to exclusion and deportation, including strikers and persons inciting or likely to incite strife in the Canal Zone. Federal Register, Vol. 5, p. 1943.

⁹⁴ Executive Order No. 2527, Feb. 6, 1917, related to the Exclusion of Undesirable Persons. Ex. O., p. 220. Executive Order No. 2526, of the same date, dealt with the Exclusion of Chinese. *Ibid.*, p. 222. Governor's Circulars, Series 714, amplify details of Order No. 2527; and Series 714-1 relate to the exclusion of Chinese. Exclusion was placed within the sphere of the Division of Quarantine.

The different classes of undesirable persons followed the listing contained in the President's letter of May 9, 1904, *supra*, note 91, adding persons liable to become a public charge, and those likely to impede the Canal as mentioned above. Certain groups of Chinese were allowed to enter, *viz.*: diplomatic and consular personnel; lawful residents of the Canal Zone in 1917; persons in United States service; domestic servants of United States officials; persons admitted by authority of the Governor.

Sec. 2 of Order No. 2527, allows persons of the excluded classes to cross the Canal Zone to reach a final destination but in the custody of a representative of the Canal Zone authorities. Crew members may not be paid off and discharged at Canal Zone ports without the consent of the Canal Zone authorities. All vessels approaching the Canal are required to fill out, swear to, and hand over to the Canal officials a formal descriptive list of all Chinese persons on board.

Violations of the orders are punishable by fine not exceeding \$500, imprisonment not exceeding a year, or both, and vessels may be refused clearance until all matters concerning violations, fines, etc., have been cleared up.

Executive Order No. 2527 was amended by Order No. 3903, of Sept. 13, 1923, requiring that bond be posted for those allowed to cross the Canal Zone. Ex. O., Supp. No. 2, p. 337. The 1925 Navigation Rules for the Canal incorporated the orders relating to the exclusion of undesirables and Chinese. *Ibid.*, Supp. No. 10, pp. 382, 395-397.

See also Immigration Act of 1924, which, however, was applicable only in part to the Canal Zone. 43 Stat. 153. Executive Order No. 4125, Jan. 12, 1925 (Ex. O., Supp. No. 8, p. 372), laid down the requirements concerning documents to be possessed by aliens entering the United States. While this order required aliens entering the United States to be in the possession of passports duly visaed by American consular officials, exception was made in the case of aliens and seamen on board vessels bound for foreign ports and merely touching at ports of the United States. This order was further amended by Executive Order No. 5869, July 30, 1932, *ibid.*, Supp. No. 22, p. 436. Both orders provided that masters of vessels of all nationalities sailing for a port of the United States, which would naturally include the Canal Zone ports, must submit to the American consular officers at the port of departure a list of all alien members of the crew. For further amendments of the same, see Executive Order No. 6722, May 26, 1934, *ibid.*, Supp. No. 27, p. 467, dealing especially with documents required of bona fide alien seamen arriving at ports of the United States; and

The United States has gone even farther in controlling the presence, movements, and activities of foreigners and subjects in and about the Canal during periods of national emergency, neutrality and belligerency. Any or all persons on board vessels anchored within or passing through the waters of the Canal may be forced to leave such vessels.⁹⁵ Destruction or injury of any vessel, conspiring to violate the laws or treaties of the United States on board a vessel, gathering information for the benefit of a foreign Power or to be used to the injury of the United States, obstructing commerce, personally directing or taking part in the setting on foot of military expeditions, are serious offenses and punishable under the provisions of the Espionage Act of 1917.⁹⁶ Likewise applicable to persons on board vessels during such times are the laws designed to prevent the injury or destruction of war materials,⁹⁷ the circulation of reports interfering with the operation of the armed forces or crippling or hindering the United States in the prosecution of war,⁹⁸ the trading with the enemy acts,⁹⁹ and the act to restrict and prohibit the entry and departure of persons from the jurisdiction of the United States.¹⁰⁰ Additionally, the United States, by Presidential Proclamation of November 17, 1917, forbade alien enemies to "enter or be found within the Canal Zone."¹⁰¹ These various measures will be treated at greater length in examining the procedure during periods of emergency and war.¹⁰²

The United States has long followed the general principle of not interfering with matters affecting the internal economy of foreign vessels within its territorial waters unless appealed to by the master of the vessel or by the consul of the country in which the vessel is registered, or unless the activities taking place on board the vessel involve violations of the criminal or prohibition laws, or affect the peace of the port. Any narrow canal may be rendered useless for a time by vessels navigated in such a way as to cause obstructions. A lock-canal is the most delicate of waterways. Injury to the mechanism of the lock system may easily put such a canal out of commission for a long period. The foreign policies and national defense plans of the United States make it imperative that the Panama Canal should always be unobstructed and open to the navigation of its war and commercial vessels. The entire Canal might be obstructed by malicious tampering

Executive Order No. 6986, March 9, 1935, *ibid.*, Supp. No. 28, p. 474, providing that aliens must possess unexpired passports or official documents and that no visa or "transit certificate" shall be granted to aliens whose entry would be contrary to the public safety.

Deportation is determinable, under the Order of Feb. 6, 1917, after giving opportunity to be heard. If such opportunity is not given, the District Court, or, on appeal, the Circuit Court of Appeals at New Orleans, may, by *habeas corpus* inquire into the authority for depriving anyone of liberty. Opinion of the Judge Advocate General of the Army, March 4, 1920, Digest of Opinions, Sec. 2143.

⁹⁵ Act of June 15, 1917, Title II, Sec. 1, 40 Stat. 217; Executive Order No. 8243, Sept. 5, 1939, Federal Register, Vol. 4, p. 3823.

⁹⁶ Act of June 15, 1917, *cit. supra*.

⁹⁷ 40 Stat. 533.

⁹⁸ 40 Stat. 553.

⁹⁹ 40 Stat. 411.

¹⁰⁰ 49 Stat. 559.

¹⁰¹ Ex. O., p. 230.

¹⁰² These will be dealt with in a succeeding issue of this JOURNAL.

with the machinery of a vessel in transit, by materials thrown or released from such a vessel, by actions on board, or even by contracts and agreements made on board. These considerations have dictated the evolution of the laws and orders applying to persons entering, passing through and remaining within the Canal and Canal Zone, whether on board ship, or on land or in the air in the neighborhood of the Canal system. They make it doubly important that no doubt whatsoever should exist regarding the jurisdiction of the United States over all persons, vessels and things within, near, and relating to the Panama Canal.

Wireless telegraphy was emerging as a means of international communication during the construction of the Canal. The armed services of the United States quickly appreciated its bearing upon the operation and protection of the Canal. Army and naval radio stations were erected along the Canal route and in the Zone, and from 1911 these services advocated procurement of entire control of all stations and communications not only in the Zone, but throughout the Republic of Panama.¹⁰³ While negotiations proceeded with Panama toward this end,¹⁰⁴ the United States in the meantime established its own plenary authority over such matters within the Canal Zone and over foreign vessels within the Canal. The Radio Communications Act of August 13, 1912, prohibited the erection of commercial stations within fifteen miles of any naval or military radio stations, existing or established in the future, in the Canal Zone.¹⁰⁵ Section 6 of the Panama Canal Act of August

¹⁰³ For. Rel., 1912, p. 1206. The motivation was well expressed by Secretary of Navy Daniels:

"The fundamental reason why the United States Government should have a monopoly of all means of radio communication in the Republic of Panama lies in the fact that the United States is the sole guarantor of the independence of Panama and of the protection of the Canal. To fulfill these obligations it is militarily essential that the United States shall have actual physical control of all radio stations, not only in the Canal Zone, but in the Republic of Panama, at a time when the independence of Panama may be in jeopardy or the United States may be at war or be threatened with war. The one sure way to attain this end is to have the stations owned and operated at all times by the United States Government. Then in emergencies the trained operators, under military discipline, and familiar with both languages, will be on the spot and actually at work in their usual places, with no necessity for replacement at a critical time." *Ibid.*, 1914, p. 1040.

¹⁰⁴ *Ibid.*, 1912, pp. 1207-1240; *ibid.*, 1914, pp. 1037-1052. A coöperative attitude was displayed by Panama officials from the outset. *Ibid.*, 1912, p. 1209. The Solicitor of the Department of State took the view that as a result of the language of the 1903 Convention, it was not necessary "as a matter of law . . . to enter into any formal negotiations" with Panama. He held that Arts. 2, 4, 6, and 13 empowering the United States to operate, maintain, and protect the Canal, and to acquire "auxiliary works," conferred adequate title to establish stations in the Republic, and to regulate radio communications there. It was also argued that the right of eminent domain would extend to closing stations in the Zone or in the territory of Panama competing or interfering with the Canal stations. *Ibid.*, 1912, pp. 1221-1233.

¹⁰⁵ Sec. IV, Regulation 189, 37 Stat. 302. While this measure was in the process of enactment, the United States signed, and subsequently ratified, the International Wireless Telegraphy Convention. U. S. Treaty Series, No. 581; 38 Stat. 1672. The International

14, 1912, authorized the President to erect, maintain and operate radio stations along or near the Canal in connection with the Canal, "and for other purposes." It also recommended the conclusion of arrangements with Panama in case it should appear "necessary to locate such installations upon the territory of the Republic." In the event of the erection of such stations, it was stipulated that, while United States Government messages should always have priority, messages of the Government of Panama, as well as all private and commercial messages, should be accepted and transmitted. Finally, the Act sanctioned operating agreements and leases with private operating companies to assure non-interference with the Government stations.¹⁰⁶ The Rules and Regulations for the Operation and Navigation of the Panama Canal, issued on July 9, 1914, laid down rigid requirements concerning the use of radio on ships within Canal waters, and left no doubt as to the authority of the United States in this regard.¹⁰⁷

The coincidental outbreak of the European War with the opening of the Canal to navigation impelled the United States Government to demand an

Telecommunication Convention, signed at Madrid in 1932, which superseded the 1912 Convention, contained an article (Art. 13) reserving the right to governments to conclude special arrangements *inter se*, provided they remained within the general terms of the multilateral convention as regards interference. U. S. Treaty Series, No. 867; 49 Stat. 2391. Both Panama and the United States have ratified the 1932 Convention.

The only existing or authorized stations within 15 miles of the United States' stations in the territory of the Republic of Panama were a Panama Government station, and two commercial concessions. For. Rel., 1912, pp. 1209-1213.

¹⁰⁶ 37 Stat. 560.

¹⁰⁷ Ex. O., p. 178 *et seq.* Sec. 41 specified:

"Control of radio communication is entirely in the hands of the radio shore stations. No vessel will be allowed to interfere in the slightest degree with the Canal radio stations; upon an order being received by a vessel at any time while within the waters under the control of the Canal to discontinue using radio, even if in the midst of transmission of a message, she shall immediately comply."

Secs. 44-45 required that all messages between ships in the Canal and ships at sea, or foreign stations, must be sent via the Canal shore stations. Secs. 2 and 3 embodied the sanction behind these Rules: fine of \$500 and/or six months' imprisonment for violation; non-clearance of the vessel from the Canal area until authorized by the Canal authorities. *Quaere*: Might a particularly obnoxious violator be punished under Sec. 10 of the Panama Canal Act with the greater penalty there provided (\$10,000, and/or twenty years) for obstructing "by any means or in any way" the Panama Canal, its locks or approaches?

A separate Executive Order of the same date, No. 1988, July 9, 1914, required all ocean-going steamers carrying fifty or more persons, leaving any port of the Canal Zone, to be equipped with wireless apparatus. Masters departing without such apparatus, save on vessels plying not more than 200 miles from the Zone, were subject to fine up to \$5,000, constituting a lien on the ship. *Ibid.*, p. 178.

These radio provisions were reincorporated with slight modification in the 1923 Transit Regulations. *Ibid.*, Supp. No. 3, pp. 339, 358. Sec. 41 of the 1914 Rules was modified by leaving out all of the second sentence noted above. The 1925 Canal Rules carried on the 1923 Regulations, further abbreviated. Additionally, they revised the 1914 requirement that all ocean-going steamers carrying fifty or more persons be fitted with radio, to exclude "vessels merely transiting the Canal." *Ibid.*, Supp. No. 10, pp. 382, 400.

"immediate monopoly of all wireless stations in the Republic of Panama and control [of] the radio equipment of all ships in the territorial waters of Panama."¹⁰⁸ The Government of Panama acceded readily, and on August 29, 1914, the President of Panama issued a decree placing all wireless stations "fixed and movable, and everything relating to wireless communications in the territory and territorial waters of Panama . . . under the complete and permanent control of the United States of America; and to attain that end said Government will take the measures which it deems necessary."¹⁰⁹

The agreement with Panama, followed by the Decree of August 29, 1914, completed the control of the United States of all wireless apparatus and communication, on shore and aboard ship, in the Canal, the Canal Zone, the Republic of Panama, and in the territorial waters of the latter. This constituted an important element in the protection and operation of the Canal, which the scientific advances in radio engineering and the universal use of this means of communication have confirmed in the years since 1914. For the sake of the safety of the Canal, as well as for the efficiency of its operation, the United States has felt that it could not afford to allow control to slip from its hands. It has been willing to enter into international arrangement only in so far as this does not interfere with the conduct of Canal business, and does not in any way open the door to the establishment of unfriendly stations or communications in proximity to the Canal.

The conservative attitude of the United States toward the erection of radio stations within the Republic, including broadcasting and reception equipment, produced restiveness in government circles in Panama.¹¹⁰ The unsuccessful conclusion of negotiations for a new treaty in 1926 further stimulated resentment in Panama, and led President Arosemena to abrogate the 1914 Decree on December 29, 1930, just before his government was overthrown.¹¹¹ To remedy the uncertain situation created by President Arosemena's action, a Convention Providing for the Regulation of Radio Com-

¹⁰⁸ Secretary Bryan to Minister Price, Aug. 13, 1914, For. Rel., 1914, p. 1046.

¹⁰⁹ *Ibid.*, pp. 1046-1050, 1051. A Decree was issued previously on Aug. 15, 1914, giving the Canal Zone Government provisional authority of the same nature. For. Rel., 1923, Vol. II, pp. 695, 697.

¹¹⁰ See note from Minister of Panama to Secretary of State Hughes, Dec. 19, 1922, complaining that the 1914 Decree was meant to cover only the wartime emergency, and that under existing arrangements Panama was denied a sovereign right. The Minister insisted on the need of an intergovernmental convention to warrant the powers exercised by the United States. *Ibid.*, pp. 695-698. Mr. Hughes refused to acknowledge the temporary nature of the 1914 Decree and insisted that it represented a formal agreement between the two governments, intended to give permanent control to the United States. He insisted present conditions would not justify abrogation of the Decree, and that United States control was essential to the protection of the Canal, and to the guarantee of independence of Panama. The Secretary of State added that the United States was ready to negotiate adaptation of the regulations to the new conditions, and to discuss the matter in connection with the treaty negotiations then projected. *Ibid.*, pp. 699-700.

¹¹¹ McCain, *op. cit.*, p. 180; New York Times, Jan. 3, 1931.

munications was signed with Panama on March 2, 1936, in conjunction with the signature of the General Treaty of Friendship and Coöperation of that same date.¹¹² While this arrangement has been ratified by the National Assembly of Panama, it has not yet been consented to by the Senate of the United States.¹¹³

Under these circumstances, what protection has the United States for the Canal regarding radio activities within the jurisdiction of Panama? By Article 1 of the General Treaty of Friendship and Coöperation, Panama and the United States have declared their willingness to coöperate, so far as it is feasible, for the purpose of ensuring the full realization of the benefits which the Canal should afford to both states. By paragraph 2 of Article 2 the parties recognize "their joint obligation to ensure the effective and continuous operation of the Canal and the preservation of its neutrality," and to take such measures "as it may be necessary to take in order to ensure the maintenance, sanitation, efficient operation, and effective protection of the Canal. . . ." In view of the fact that all electrical communications in the neighborhood of the Panama Canal are obviously closely related to the efficient operation and effective protection of the Canal, as well as to the safety of the Republic, a close coöperation should exist between the two states, and no obstacle should be allowed to stand in the way of exercising such control

¹¹² Text of the signed convention in Sen. Doc., Executive C, 74th Cong., 2d Sess., p. 7.

¹¹³ The convention was reported favorably to the Senate by the Committee on Foreign Relations July 20, 1939. Exec. Report No. 17, 76th Cong., 1st Sess., Cong. Rec., July 20, 1939, p. 9578. At the time of consent by the Senate to the General Treaty of Friendship and Coöperation, Senator Pittman announced that he would not press for consideration of the Radio Convention at that time. *Ibid.*, July 25, 1939, p. 9909. It has not been considered by the Senate since that date.

This instrument recognizes the sovereign right of Panama to regulate, license, and control radio stations and communications within the territory of the Republic. That state covenants, however, to coöperate with the Government of the United States on the assumption that all radio matters are related both to the security and independence of the Republic of Panama and to the operation and protection of the Canal. Radio boards are provided for in each jurisdiction, which are to study their common problems and make recommendations to both governments. Exchange of operators and full information regarding all stations, equipment and procedures is called for, as well as joint control in time of emergency. The United States is assured that stations in the territory of Panama interfering with the operation of the Canal, or involving the security of the Canal or of Panama, will be forced to cease operation. The United States is accorded a monopoly over all traffic concerning the Canal. The United States is also protected by terms which provide for the installation of United States Government stations in the territory of Panama, if necessary for the protection and operation of the Canal. Furthermore, joint supervision is ordained for "everything relating to radio communication, including broadcasting, in case of an international conflagration or the existence of any threat of aggression which would endanger the security of the Republic of Panama or the neutrality or security of the Panama Canal."

A Regional Radio Convention was signed by representatives of the Governments of Costa Rica, El Salvador, the United States of America in behalf of the Canal Zone, Guatemala, Honduras, Nicaragua, and Panama on Dec. 8, 1938, establishing agreement on operating frequencies in the area surrounding the Canal Zone. U. S. Treaty Series, No. 949. This has been ratified by the United States and Guatemala, but not by Panama or the other signatories.

over radio as may be necessary for securing the integrity of the Republic and fulfilling the Canal mission.¹¹⁴ Although it might be desirable to have a bilateral radio convention in force, rights and power exercisable under treaties and conventions now in force do not make this entirely necessary.

When the Hay-Pauncefote Treaty and the Convention for the Construction of a Ship Canal were drawn up, aircraft had not entered the picture, either as media of international transportation or as military weapons. The arrangements of 1901 and 1903 held in view only transportation by water and by land, and the desirability of affording the Canal Power the rights pertinent to the construction, operation, maintenance and protection of such routes across the Isthmus of Panama. The superjacent airspace was of no vital concern. Hence, the treaties made no reference to it. Neither did the basic laws.¹¹⁵ Such omission did not deter the United States. On the contrary, it acted from the moment the use of aircraft became a practical matter as if it had entire freedom of action in regulating the use of the airspace above the Canal Zone.¹¹⁶

A Presidential Order of August 7, 1913, inaugurated the law applicable to aircraft in the vicinity of the Canal. This made it unlawful for any type of aircraft to be operated "in or across the Canal Zone" without written authorization from the "Chief Executive of the Canal Zone."¹¹⁷ This order has remained the basic law in time of peace. During the period of American neutrality, 1914-1917, aircraft of belligerents were forbidden to descend, arise, or fly through the airspace "above the lands and waters" within the jurisdiction of the United States in the Canal Zone.¹¹⁸ When the United States became a belligerent, this prohibition was qualified in its own favor.¹¹⁹ Somewhat later during the war, the President proclaimed the whole of the

¹¹⁴ In the negotiation and conclusion of the 1936 Treaty it was agreed that unilateral action by the United States within the territory of the Republic may precede "consultation." Sen. Exec. Report No. 5, 76th Cong., 1st Sess., p. 5; this JOURNAL, Vol. 34 (1940), Supp., p. 157.

¹¹⁵ The language of Art. 10 of the 1912 Act is construable, however, to cover regulation of movement in the airspace: "That after the Panama Canal shall have been completed and opened for operation the Governor of the Panama Canal shall have the right to make such rules and regulations, subject to the approval of the President, touching the right of any person to remain upon or pass over any part of the Canal Zone as may be necessary."

¹¹⁶ The Joint Neutrality Board believed, according to a memorandum of Oct. 20, 1914, that because the treaties left the status of the airspace undecided, "the United States can with the greater propriety establish its own position in the matter." MS. Department of State.

¹¹⁷ Executive Order No. 1810, Ex. O., p. 150. The order forbade the taking or making of pictures and sketches from aircraft without permission. A fine of not more than \$1,000, or imprisonment not exceeding a year, or both, was made the punishment for violation. Taking or making pictures or sketches from aircraft would also come within the terms of Title I of the Espionage Act, 40 Stat. 217, 220. Violation of this law is punishable by fine up to \$10,000, or imprisonment for not more than two years, or both.

¹¹⁸ Rule 15 of Proclamation of Neutrality for the Canal Zone, Nov. 13, 1914, 38 Stat. 2039; Ex. O., p. 203. See Proclamation No. 2350, Sept. 5, 1939, below.

¹¹⁹ Proclamation of May 23, 1917, Rule 13, 49 Stat. 1667. Otherwise the restriction remained as in 1914.

Canal Zone and its territorial waters a zone of military operations over which civilian aircraft might fly only after the obtainment of a special license.¹²⁰

After 1920, commerce and transportation by air became an established practice and a matter of national and international concern. In 1926 Congress passed the Air Commerce Act, Section 6 of which declared that

the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the air space over the lands and waters of the United States, including the Canal Zone. Aircraft a part of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, save in accordance with an authorization granted by the Secretary of State.¹²¹

The Act did not undertake to regulate commercial and private aircraft in or above the Canal Zone. These remained subject to regulation by the Governor acting under the Order of August 13, 1914, referred to above, until the passage by Congress of an Act of July 9, 1937, amending the Canal Zone Code gave formal legislative basis for Presidential regulation.¹²²

In response to the requests of commercial aviation interests for permission to establish routes to South America passing across the Canal Zone, President Coolidge in 1928 designated the Secretary of State to receive such applications and to prescribe the conditions under which they might be accepted.¹²³ Pursuant to an Executive Agreement with the Government of Panama, both governments issued identical orders governing private and commercial air navigation.¹²⁴ The American regulations reintroduced the principle contained in the Proclamation of February 28, 1917, declaring the Panama Canal Zone, "including the three mile limit," to be a military air-space reservation. Local control in and over the Canal Zone and over Panaman jurisdiction was continued in the hands of the Governor of the Canal and of a Joint Board composed of the Governor, the Army Com-

¹²⁰ Proclamation No. 1432, Feb. 28, 1918, 40 Stat. 1753. It is interesting to observe the ground on which the proclamation was issued: "Whereas, the United States of America is now at war, and the Army and Navy thereof are endangered in their operations and preparation by aircraft. . . ." This proclamation was abrogated by Proclamation of July 31, 1919, 44 Stat. 1765.

¹²¹ 44 Stat. 568.

¹²² 50 Stat. 486. The Act provided:

"The Government of the United States is hereby declared to possess, to the exclusion of all foreign nations, sovereign rights, power, and authority over the air space above the lands and waters of the Canal Zone. Until Congress shall otherwise provide, the President is authorized to make rules and regulations and to alter and amend the same from time to time governing aircraft, air navigation, air navigation facilities and aeronautical activities within the Canal Zone."

Penalty for violation of the executive rules and regulations was made a fine not exceeding \$500, imprisonment for not more than a year, or both.

¹²³ Executive Order No. 4971, Sept. 28, 1928, Ex. O., Supp. No. 16, p. 417.

¹²⁴ Executive Order No. 5047, Feb. 18, 1929, *ibid.*, Supp. No. 17, p. 420. An Executive Order was issued by the President of Panama May 4, 1929. The regulations subjected all aircraft other than military, naval, customs, or police aircraft to the same treatment as private aircraft.

mandant in the Canal Zone, the chief naval officer stationed in the Canal Zone, and three representatives of Panama.¹²⁵ Requirements were laid down concerning the papers to be carried by aircraft. Authority was conferred to require aircraft to enter, transit, or leave the Canal Zone via prescribed routes, and to compel craft failing to conform to descend and remain grounded. In special circumstances the Governor was empowered to suspend the operation of any or all aircraft over or within the Canal Zone. Arms, ammunition of war, as well as articles generally prohibited by law or regulations, were forbidden carriage in aircraft above the Canal Zone. Photography and the making of any drawings or maps of defense installations or equipment in the Canal Zone were made unlawful and subject to censorship or other discretionary action.¹²⁶

The outbreak of war in Europe and the consequent proclamation of neutrality by the United States in September, 1939, led to determination of the rules to be enforced for belligerent aircraft in and over the Canal Zone, as well as for all other aircraft during such times. On September 5 the President issued a Proclamation Prescribing Regulations Concerning Neutrality in the Canal Zone, which provided, in language closely resembling the phraseology of the November 13, 1914, Proclamation, that "no belligerent aircraft shall be navigated into, within, or through the airspace above the territory or waters of the Canal Zone."¹²⁷ This was followed by an

¹²⁵ *Re* composition of Board, see D. Munro, *The United States and the Caribbean Area* (Boston, 1934), p. 84.

¹²⁶ Penalty of a fine up to \$500 or imprisonment up to one year was prescribed for violation of the regulations.

Further regulations were issued by the Secretary of State, Feb. 26, 1929, containing information regarding permits, authorizations, inspections, traffic rules, etc. This JOURNAL, Vol. 23 (1929), Supp., p. 123. Shortly after the issuance of these regulations, Pan American Airways commenced regular service to South America with landings at David and at Panama City. Bulletin, Pan American Union, Vol. 63 (1929), pp. 615, 833.

¹²⁷ Proclamation No. 2350, Sept. 5, 1939, Federal Register, Vol. 4, p. 3821. It may be worth while to call attention to the fact that this proclamation was for Neutrality in the Canal Zone in the War between Germany, France, Poland, the United Kingdom, India, Australia, and New Zealand. When, some days later, the Union of South Africa and Canada declared a state of war to exist between each of them and Germany, the United States issued general proclamations of neutrality for each of those wars, comparable to its Proclamation of Neutrality of Sept. 5, 1939. (For Union of South Africa, Sept. 8, Federal Register, Vol. 4, p. 3851; for Canada, Sept. 10, *ibid.*, p. 3857.) It *did not*, however, in either case issue Proclamations Prescribing Regulations Concerning Neutrality in the Canal Zone in the wars of those Powers and Germany. Neither did it issue such proclamations following the proclamations of neutrality for the wars between Germany and Norway (April 25, 1940, *ibid.*, Vol. 5, p. 1569); Germany and The Netherlands, Luxembourg, and Belgium (May 11, 1940, *ibid.*, p. 1689); Italy, and France and the United Kingdom (June 10, 1940, *ibid.*, p. 2191). Thus, technically, the aircraft of Canada, the Union of South Africa, Norway, The Netherlands, Belgium, Luxembourg, and Italy are not excluded from the airspace above the territory and waters of the Canal Zone by virtue of special proclamations. *Quære*: Does such action on the part of the United States open it to the charge of unequal treatment of belligerents?

Executive Order containing Regulations Governing the Entrance of Foreign and Domestic Aircraft into the Canal Zone and Navigation Therein, issued on September 12, 1939.¹²⁸ As in the Proclamation of February, 1918, and the Order of February, 1929, the airspace above the Canal Zone, including the marginal waters, was set apart as a military airspace reservation. Navigation of foreign or domestic aircraft within or through this area (other than public aircraft of the United States) was made unlawful except in conformity with the provisions of the order, and after the granting of authority by the Civil Aeronautics Authority, in the case of domestic aircraft, and by the Secretary of State in the case of other aircraft. Such authority, it was added, "shall be granted only after consultation with the Secretary of War," and shall be subject to all rules and regulations issued concerning aircraft in the reservation. Following the terms of the 1929 Order, it was stated that all craft may be required to follow prescribed routes and to land at specified places; and must communicate in every instance of flight with the Governor of the Panama Canal prior to entry into the reservation. Cameras were ordered sealed and no firearms, munitions or explosives might be carried without the consent of the Canal authorities. Special permission was required for every flight for aircraft operated by or transporting any foreigners. All such craft must approach the reservation to a rendezvous point designated by the Governor, where they must be met by an official escort of Canal Zone aircraft which must be followed closely to the landing-point, and, on leaving, to the rendezvous point.¹²⁹

Question may properly be raised whether the "neutralization" of the "Canal," provided for in the Hay-Pauncefote Treaty and in the Canal Convention, applies to and in any way limits the control of the United States over the airspace above the Canal and Canal Zone. Considering that Article 3 of the Hay-Pauncefote Treaty uses only the word "vessels," and considering the nature of airspace and the freedom of movement inherent in aircraft as contrasted with ocean-going vessels, it would seem reasonable to conclude that no limitation was placed upon the United States concerning the airspace above the Canal and craft passing therethrough. May the United States, however, prevent foreign aircraft from flying across the Isthmus directly above the Canal which is "free and open to the vessels of commerce and of war of all nations"? It is believed that it may, and that the airspace above the Canal was not neutralized and made free and open to aircraft

¹²⁸ Executive Order No. 8251, Federal Register, Vol. 4, p. 3899.

¹²⁹ The order empowers the Governor to make further rules and regulations. Sec. 9 stated that this order was to be administered in connection with Order No. 8233 of Sept. 5, 1939, Prescribing Regulations Governing Enforcement of the Neutrality of the United States, and Proclamation No. 2350, Sept. 5, 1939, Prescribing Regulations Concerning Neutrality in the Canal Zone, *cit. supra*. Sec. 6 of the Order, regarding applications, was amended by Executive Order No. 8271, Oct. 16, 1939, Federal Register, Vol. 4, p. 4277. The Department of State issued regulations pursuant to this order restating its general provisions on Oct. 10, 1939. Department of State Bulletin, Oct. 14, 1939, pp. 379-380.

navigating in the airspace. Question may also arise whether Great Britain, as the other party to the Hay-Pauncefote Treaty, is bound to refrain from hostile acts as a belligerent in the airspace above the Canal when she may be at war. Certainly a canal is a waterway and not an airway. Great Britain and the United States agreed upon rules to be applied to vessels in a "ship canal." They made no agreement concerning either a right of passage, or of the freedom or limitation of action in the airspace above a ship canal. The United States exercises rights of sovereignty over the Canal Zone by virtue of the Convention with Panama. That convention contained no limitation on the exercise by the United States of jurisdiction over the airspace. Since then the United States has accepted no limitation whatsoever respecting its absolute control of all the airspace above the waters of the Canal and the territory of the Canal Zone.

When the United States concluded the Treaty with Great Britain in 1901, it was concerned, among other things, with obtaining a free hand for the fortification and militarization of the Panama Canal.¹³⁰ In the end, the negotiators left the matter with an agreed silence, which the British Government later admitted carried with it a right for the United States to act as it saw fit.¹³¹ The Convention with Panama, on the other hand, contained an express mandate for the erection of fortifications and for American armed forces to take measures for the protection of the Canal.¹³² Money was appropriated by Congress for soldiers serving in the Canal Zone as early as April 23, 1904,¹³³ but was not appropriated for fortifications until 1911.¹³⁴ From this time on, money was regularly appropriated for fortifications and for the defense of the Canal. It has been estimated that up to 1939 the United States had spent \$110,000,000 for these purposes.¹³⁵ No protest appears in published diplomatic correspondence from any foreign government against the introduction of fortifications or the perfection of military defense measures, whether by land or sea. Article 19 of the Naval Armaments Treaty of 1922 pledged the signatory Powers to preserve the *status quo* of certain fortifications, but specifically exempted those at the Panama Canal Zone from any limitation.¹³⁶ Some time before the Canal was completed the United States obtained permission from Panama for its armed forces to reconnoiter in the territory of the Republic in order to study the terrain and strategic factors there in their relation to the Canal, and in

¹³⁰ N. J. Padelford, "American Rights in the Panama Canal," this JOURNAL, Vol. 34 (1940), pp. 420-421.

¹³¹ *Ibid.*, p. 421.

¹³² *Ibid.*, p. 432.

¹³³ 33 Stat. 266.

¹³⁴ 36 Stat. 1449. This appropriation was for the construction of coastal defense batteries.

¹³⁵ Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, March 14, 15, 16, 1939, p. 65.

¹³⁶ 43 Stat. 1655, 1662-1663. The Proceedings of the Conference reveal no discussion of this exemption.

order to make plans for any contingency which might arise affecting the security of the Canal.¹³⁷ This was further substantiated by an exchange of notes between Secretary of State Hull and Minister Boyd, February 1, 1939, in connection with the ratification of the General Treaty of Friendship and Coöperation.¹³⁸ It was agreed by Article 10 of that treaty that in the event of an international conflagration or events threatening the security of Panama or the Panama Canal, the United States and Panama would consult on military measures to be taken in the territory of Panama. And it was made plain in the negotiations and agreed to by the Government of Panama that under some circumstances consultation might have to follow rather than precede military action.¹³⁹

On August 15, 1939, the Panama Canal celebrated twenty-five years of operation.¹⁴⁰ Over one hundred and four thousand transits of the Canal have been made since the historic voyage of the S.S. *Ancon* on August 15, 1914. From every point of view the Canal project has been a great undertaking, beneficial alike to world commerce and to the United States. The completion of admittedly one of the greatest engineering feats of man,

¹³⁷ República de Panamá, Secretaría de Gobierno y Relaciones Exteriores, *Memoria*, 1912, pp. 49-50.

¹³⁸ U. S. Treaty Series, No. 945, pp. 63-67.

¹³⁹ *Supra*, note 114. Ratification of the 1936 Treaty was held up in the United States for a time on account of the feeling in Army and Navy circles that the interests of the United States had not been adequately cared for. The uncertainties were removed in large part by the exchange of notes of Feb. 1, 1939, Cong. Rec., July 24, 1939, pp. 9828-33. See also Sen. Exec. Report No. 5, 76th Cong., 1st Sess., pp. 2-3; U. S. Treaty Series, No. 945, pp. 63-64.

In the debate in the Senate on the ratification of the treaty, Senator Pittman stated that the Feb. 1, 1939, note of the Panama Minister reproduced some Minutes of the negotiations of the treaty, authorized by both governments, and that it was to be regarded as evidence of the intention of both parties concerning the ambiguous phrases. He also said that the United States is the party to determine when an emergency exists which requires consultation and/or immediate action. Cong. Rec., July 24, 1939, pp. 9833-9834. See also, further statement by Senator Pittman, *ibid.*, p. 9837. Some doubt still existing in the minds of the Senators concerning the weight to be attached to the Boyd-Hull letter, Senator Pittman on July 25, 1939, stated: "I say that when the Minister Plenipotentiary of Panama to this country, with full and general powers, reports to our Government that his Government ratified the Treaty with certain understandings, we not yet having ratified it, if we ratify it under certain representations by the Minister of Panama, Panama is bound by those reservations, because we have a right to accept representations by the Minister of Panama, who has plenipotentiary powers to deal with this Government." *Ibid.*, July 25, 1939, p. 9902. Senator Pittman then introduced another note from Minister Boyd to Secretary Hull dated July 25, 1939, noting that the question of whether the Panama legislature knew of and had before it the Minutes of negotiations referred to in the note of Feb. 1, 1939, had been raised in the Senate, and quoting from Panama Law No. 37 of 1936 approving and ratifying the treaty which contained the words " . . . which is done taking into account the Minutes and exchanges of notes . . ." *Ibid.*

¹⁴⁰ An interesting booklet was prepared for the occasion, summarizing the history of the Canal project, the construction, operation, maintenance, and present-day functioning of the Canal. The Panama Canal, Twenty-Fifth Anniversary (Mt. Hope, 1939).

as well as the manner of its operation and protection, testify in these days, when aspersions are being cast upon democracy, to the fundamental truth that democracies can build on vast scales and can function efficiently and for long periods of time in ways that refute the very bases upon which the "isms" which criticize them seek to vaunt their own glories. No dictatorship of modern times has matched in quality or performance the undertaking that is the Panama Canal.

In the foregoing pages an effort has been made to trace the lines along which the regulation and governance of the Panama Canal have proceeded in times of peace. Notwithstanding the "neutralization" clauses in the treaties with Great Britain and with Panama, the problems of war and defense have come close to the Canal. The first World War, coinciding with the opening of the Canal to navigation, abounded with questions calling for the institution of special rules and laws for the Canal and for vessels seeking transit. The hostilities now transpiring in Europe have already dictated the adoption of extraordinary precautions. These questions and the negotiations relating to the Canal in times of emergency and of war will be treated in a succeeding issue of this JOURNAL.

AGENCY IN INTERNATIONAL LAW

BY ANGELO PIERO SERENI

Formerly Professor of Law, University of Ferrara, Italy

I. In the field of international law every subject generally acts in person, through its own organs, without resorting to coöperation with other subjects. However, international practice shows that members of the community of nations sometimes act on behalf of other members, with the legal effect that the transactions performed by the acting subject in the name and for the account of the other have for the latter the same legal consequences as if it had acted in person. This happens, for example, when a state, duly authorized, concludes through its own organs a treaty for another state: the latter is thus bound by the treaty exactly in the same way as if it had concluded the treaty itself, through its own organs. This legal phenomenon implies a split between the immediately acting international person and the person to whom the legal effects of these acts are imputed.

Applying to international relations terms and definitions which have been elaborated and most frequently used in the field of domestic law, the international person¹ for which action is taken may be defined as *principal*; the international person acting on behalf of the principal, as *agent*; the relationship existing between these parties, as *international agency*.² The terms "*representation*," "*représentation*," "*Stellvertretung*" have also been used in international instruments to designate this relationship.³

¹ The terms "international person" or "subject of international law" have been frequently used in this article instead of the term "state" in order to designate the parties to an agency relationship; for the status of principal and agent in international relations is not confined to states in the technical sense, but is also accorded to subjects of international law other than states, such as the League of Nations and the communities under Mandate A of the League of Nations.

² The study of international agency has until now attracted few writers. For a complete survey of this subject, see A. P. Sereni, *La Rappresentanza nel Diritto Internazionale* (1936). The only earlier works on international agency are: M. Marinoni, *La Rappresentanza di uno Stato da parte di un altro e le Relazioni a cui dà origine* (1910), and G. Cavarretta, *La Rappresentanza Convenzionale nel Diritto Internazionale Contemporaneo* (1928). A brief reference to international agency in general may be found in the following works: P. Heilborn, *Völkerrecht* (1914), in Höltzendorff's *Enzyklopädie des Rechtswissenschaft*, Vol. 5, p. 514 ff.; D. Anzilotti, *Corso di Diritto Internazionale* (1912), I, p. 271 ff.; T. Perassi, *Lezioni di Diritto Internazionale* (1937), p. 147 ff.; G. Balladore Pallieri, *Diritto Internazionale Pubblico* (1938), p. 221 ff.

³ Treaty of London between France, Russia, Great Britain and Italy, of April 26, 1915, Art. 7: "Italy will be charged with the *representation* of the state of Albania in its relations with foreign Powers."

Treaty of Hué of June 6, 1884, establishing the French Protectorate over Annam, Art. 1: "L'Annam reconnait et accepte le protectorat français. La France *représentera* l'Annam dans toutes ses relations extérieures."

Agency requires three parties: principal, agent, and the third party with whom the agent treats. It also requires a legal system by whose rules it is governed. For, being a legal phenomenon, agency can exist and produce its legal effects only within a legal system, *i.e.* international agency is governed by international law. Therefore, this relationship can exist only between parties recognized as subjects of international law.

No international agency can be recognized where the alleged principal, agent or third party is not an international person. A state, extending diplomatic protection to its citizens or juristic persons, does not act as their international agent, since the protected persons (the alleged principals) are not recognized as members of the international community. As pointed out by the Permanent Court of International Justice in the *Panevezys-Saldutiskis Railway* case, decided on February 28, 1939, "in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law."⁴ A relationship of international agency does not exist between the state and its organs for international relations, such as diplomatic agents and consuls. These organs are not international agents because they do not have an international personality distinct from the state which they represent. As clearly stated by Anzilotti:

The intent and the act of the organ, that is of the individual within his activity as an organ of the state, is the intent and the act of the state. It is the state itself that declares its intent and acts by means of these individuals. There is no distinction between organ and state: there are not two different subjects, one of which acts for the other; there is one single subject, the state, which declares its intent and acts through its own organs. We cannot conceive the relationship between state and organ as an agency relationship: agency implies two distinct subjects, one of which declares the intention and acts for the other. But a state without its organs is nothing: it is an abstract conception; there cannot be a distinction between the state and its organs.⁵

Nor does the state, which grants its protection to the citizens of another state with regard to savage tribes without international personality, act as an agent of the state to which the protected individuals belong.

From the same principles it necessarily follows that international agency must be limited to the performance of international activities; otherwise, international agency would not be a relationship between subjects of inter-

Treaty between Switzerland and the Principality of Liechtenstein concerning the union of the latter with the Swiss customs territory, March 29, 1923, Art. 8: "Das Fürstentum Liechtenstein ermächtigt die Schweizerische Eidgenossenschaft, es bei Unterhandlungen mit dritten Staaten . . . zu vertreten und diese Verträge mit Wirksamkeit für das Fürstentum abzuschliessen."

⁴ Publications of the Permanent Court of International Justice, Series A/B, No. 76, p. 16.

⁵ *Corso di Diritto Internazionale* (1912), I, p. 126.

national law. When performing within its own domestic jurisdiction acts of legal assistance on behalf of another state, such as service of judicial papers, filing of birth and marriage certificates, care of distressed and sick citizens, of shipwrecked sailors, arrest and extradition of individuals indicted or convicted in the other state, no international acts are performed and consequently no international agency exists for lack of third parties having international personality. For the same reasons a state exercising powers within the normal domestic jurisdiction of another state does not act as an agent for the latter. Thus the occupant state exercising governmental powers towards the inhabitants of the occupied territory does not act as an agent of the legitimate power.⁶

II. The institution of international agency, as here outlined, finds frequent and varied application.

A clear instance of international agency exists when a state empowers another to act for it in all, or almost all, its international relations. In accordance with treaties with Cambodia,⁷ Annam,⁸ the Regency of Tunis,⁹ and the Moroccan Empire,¹⁰ France represents these states in all, or almost all, their international dealings. Likewise, from 1918 until recently, Denmark internationally represented Iceland.¹¹ Under the provisions governing the A-Mandates of the League of Nations, Syria and Lebanon and Palestine act internationally only through the Mandatory Powers: France and Great Britain.¹² Italy is charged with the international representation of Albania under the Convention of June 3, 1939, providing for the unification of the diplomatic and consular services of the two countries. Under Article 1 of this convention, "the management of all international relations of Italy and Albania is unified and concentrated in the Royal Ministry of Foreign Affairs in Rome." The Ministry, an organ of the Italian State, is then the organ through which Italy acts in the international field for herself and as an agent for Albania. Examples of this type of agency can be found at least since the beginning of the last century. By three identical treaties of No-

⁶ Cf. G. Balladore Pallieri, *La Guerra* (1935), p. 330 ff. The opposite view, sustained by M. Marinoni, *op. cit.*, p. 230 ff., and by Lapradelle and Politis, *Recueil des arbitrages internationaux*, I, pp. 339-340, was accepted by the Franco-German M.A.T. in *Compagnie des Chemins de Fer du Nord v. État Allemand*, April 8, 1929, *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, IX, p. 67 ff. For an exact criticism of the latter doctrine, see Ch. Rousseau, in *Revue Générale de Droit International Public*, 1936, p. 509, n. 1.

⁷ Treaty of Aug. 11, 1863, Art. 4.

⁸ Treaty of Hué of June 6, 1884, Art. 1.

⁹ Treaty of Bardo, May 12, 1881, Arts. 5 and 6, and Treaty of La Marsa, June 8, 1883, Art. 2.

¹⁰ Treaty of Fez, March 30, 1912, Art. 6.

¹¹ Act of Union, Nov. 30, 1918, Art. 7.

¹² Mandate for Syria and Lebanon, Arts. 3 and 12; Mandate for Palestine, Arts. 12 and 15. The Mandatory Power does not represent the territory under Mandates B and C of the League of Nations, according to the more precise view, which denies such territories international status.

vember 4, 1815, Great Britain was recognized by Austria, Prussia and Russia as the almost general representative of the Ionian Islands,¹³ and in the same year Austria, Prussia and Russia were entrusted by the Final Act of the Congress of Vienna¹⁴ with the representation of the City of Cracow. Madagascar's representation by France was established by the Treaty of December 17, 1885, and terminated in 1896 when Madagascar became a French colony. By Article 17 of the Treaty of Ucciali of May 2, 1882, Ethiopia agreed to be represented by Italy in all international relations. As to the compulsory or optional character of this agency, a controversy arose which will be considered later.¹⁵ By the agreement of November 17, 1905, Japan assumed charge of all the foreign relations of Korea. This representation terminated with the annexation of Korea by Japan under the Treaty of August 29, 1910. The Allies agreed by Article 7 of the Treaty of London of April 6, 1915, that after the war Italy should be charged with the representation of the State of Albania in its relations with foreign Powers. The provision, however, was not put in force. The agency of Poland for the Free City of Danzig was provided for in the Treaty of Versailles, June 28, 1919;¹⁶ its conditions, negotiated by the Principal Allied and Associated Powers, were accepted by Poland and Danzig in their Convention of November 9, 1920.¹⁷

When appointed for all the international relations of the represented state, the acting state has authority to perform for it all international transactions: to negotiate, conclude and ratify treaties; to declare war and make peace; to entertain all the diplomatic correspondence; to protect through its own diplomatic agents and consuls the citizens and interests of the other and to grant *exequaturs* to foreign consuls on the territory of the represented state. Correspondingly, every international act by a third state directed toward the represented state, such as a diplomatic protest or an instrument of ratification of a treaty, must be addressed to the agent. Lacking any direct intercourse with the represented state, the third states have no diplomatic agents accredited to its government. Since Italy's assumption of Albania's agency for international relations, the foreign legations of other states in Tirana have been left vacant and then abolished or reduced to consulates as the new Albanian status was recognized.

Other agencies are recognized whereby the agent's power is limited either to the performance of a specified class of activities, to the dealing with only certain third parties, or to the accomplishment of one or a few isolated acts. By Article 5 of the Convention for the establishment of an Economic Union

¹³ Great Britain's agency for the Ionian Islands was recognized by France in 1816 and by Turkey in 1849, and terminated in 1864 with the union of the Ionian Islands with Greece.

¹⁴ The representation of Cracow ended on Nov. 6, 1846, when the city was annexed by Austria.

¹⁵ The Treaty of Ucciali was abrogated after the Italian-Ethiopian hostilities by the Treaty of Peace of Addis Ababa of Oct. 26, 1896.

¹⁶ Art. 104.

¹⁷ Arts. 2, 4, 5, and 6.

between the two states, Belgium had authority to represent Luxembourg in the stipulation of economic and commercial treaties. These treaties were stipulated by Belgium in the name of the Economic Union; but, as the Union had no international personality, Belgium, when stipulating these treaties, acted, in effect, for herself and as an agent for Luxembourg.¹⁸ The agencies of France for the Principality of Monaco,¹⁹ and of Switzerland for the Principality of Liechtenstein²⁰ are limited to the same matters.

An unusual type of agency exists between the Moroccan Empire and Spain, whereby Spain has authority to represent Morocco internationally only for the acts referring to a part of its territory, the so-called Spanish Zone of Morocco.²¹ For other international activities France is the international agent of Morocco, as shown above.

Limited to the performance of isolated international acts was the agency provided for between Czechoslovakia, Yugoslavia and Rumania by Article 5 of the Treaty of Organization of the Little Entente, signed at Geneva, on February 16, 1933, which recited that: "According to the exigencies of the situation, the Permanent Council of the Little Entente, may decide that in any given question the representation of the point of view of the States of the Little Entente shall be entrusted to a single delegate or to the delegation of a single state." The state to which the delegation belonged acted in such a case for its own account as well as an agent for the other states.

A typical instance of international agency is to be found in the diplomatic protection which a state exercises in the interest of the citizens of another state in compliance with a mandate conferred upon it by the latter state (so-called delegated protection).²² A government may request another one to act for the diplomatic protection of its citizens with regard to third states with which it does not maintain diplomatic relations. Several minor states are not diplomatically represented in certain third states for reasons of economy, especially when the number of their subjects to be protected is small. In these cases they generally resort to the diplomatic representation of great Powers. Until the World War Switzerland did not have her own diplomatic representatives in the Turkish Empire: Swiss citizens in Turkey were under the protection of foreign Powers, especially of France and Ger-

¹⁸ Similarly, the Customs Union established between Italy and Albania by the Convention of April 20, 1939, has no international personality, so that Italy, when making the treaties for the Union (Art. 7 of the Convention), is deemed to act for herself and as an agent for Albania.

¹⁹ Treaties of Feb. 2, 1865, and of July 13, 1918.

²⁰ Convention between Switzerland and the Principality of Liechtenstein of March 23, 1923, Art. 7.

²¹ Treaty of Fez, March 30, 1912, Art. 6.

²² As to the delegated protection of citizens abroad, see: Moore, Digest, IV, pp. 653-655; E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1916), p. 471 ff.; C. C. Hyde, *International Law* (1922), I, p. 767 ff.; P. Bouffanais, *Les consuls en temps de guerre et de troubles* (1933); A. Escher, *Der Schutz der Staatsangehörigen im Ausland durch fremde Gesandtschaften und Konsulate* (1929), and the authorities therein cited.

many. The Italian Government assumed several times before the World War the diplomatic representation of Rumanian interests in different countries where Rumania did not maintain its own representatives, as, for instance, in Egypt.

Another occasion for the exercise of delegated protection is the breach of friendly relations between two Powers resulting in the reciprocal withdrawal of diplomatic representatives. In this case the protection of the interests of the respective countries in the other state is turned over to a third state. To this form of agency belongs the diplomatic protection by a neutral country of the citizens of one of the belligerents within the enemy country. It is not necessary that each of the belligerents entrust the same neutral with the power to take care of its citizens with respect to the enemy. It is even possible that several different neutral Powers be designated to protect the citizens of the same belligerent in different parts of the enemy territory. Perhaps the most widely extended employment of the services of a neutral Power for this purpose occurred during the last World War, when, until the United States entered the war, practically all the belligerents entrusted the interests of their subjects in the enemy countries to her protection.²³ The United States again is representing the interests of various belligerent countries during the present war. In every kind of delegated protection the rule is now universally recognized, as stated by the United States in several official reports, that the diplomatic and consular organs of a state, in the exercise of the protection of the citizens of another state, are always organs of the state from which they normally depend and do not become organs of the state of which the persons to be protected are citizens.²⁴ Therefore the state to which the representatives belong acts in the exercise of diplomatic protection as an agent for the state of which the citizens to be protected are subjects. It is generally accepted that the exercise of the delegated protection requires the consent (a) of the state of which the persons to be protected are citizens, (b) of the state of the diplomatic agent, and, finally, (c) of the state with regard to which the protection is to be exercised.

Normally a state entrusts another with the diplomatic protection of its citizens only when special occasion arises. However, this form of agency is sometimes stipulated by treaties in which one state agrees to extend its protection to subjects of the other when unrepresented in a third country. Since 1919 Switzerland permanently represents the interests of Liechtenstein in Sweden. Article 12 of the Convention for the establishment of an Economic Union between Belgium and Luxembourg provided that in foreign districts

²³ Ample information on this point can be found in Garner, *International Law and the World War* (1920), Vol. I, p. 22; in 22 *Revue Gén. Droit Int. Pub.*, p. 222 ff. See also G. H. Stuart, *American Diplomatic and Consular Practice* (1936).

²⁴ See Instructions to Diplomatic Officers of the U. S. (1897), p. 172; Consular Regulations, 1896, p. 174. The rule is well expressed by Acting Secretary Bacon, in *For. Rel.*, 1907, pp. 583-584, and *For. Rel.*, 1908, pp. 210-211. See especially, the State Department's Circular Instruction of Aug. 17, 1914, in this *JOURNAL*, Supp., Vol. 9 (1915), pp. 118-120.

where the Grand Duchy of Luxembourg had no consular officers, the protection of Luxembourg interests should be entrusted to Belgian consular officers. Italy's assistance shall be granted upon their request to the citizens of the Republic of San Marino on the territory of the third states where they cannot enjoy the protection of diplomatic or consular agents of their own country.²⁵ In the absence of such a previous agreement, a state is not obliged to exercise the delegated protection of foreign citizens; but, whenever it accepts this charge, it must perform it in the interest of the state to which the citizens belong. The delegated protection is in general a gratuitous function; but the state to which the protected citizens owe allegiance is generally charged with the expenses resulting from such protection.

Representation is resorted to in multipartite conventions where an international person is designated as depository of the instruments concerning the convention, such as ratifications, notifications of adhesions and denunciations, etc. The depository is frequently bound to give communication to the other signatories of the acts addressed to it. However, according to the conventions, immediately upon receipt by the depository or after an agreed period, the acts addressed to and received by the depository have the same effect for all the signatories as if addressed to and received by each of them directly. Therefore, the depository, in receiving the instruments, acts as agent for all signatories. The Geneva Convention of July 27, 1929, for the Amelioration of the Conditions of the Wounded and the Sick of Armies in the Field, provides that the ratifications shall be deposited with the Swiss Government, and also provides for the notification to the same government of each adhesion and denunciation, which shall take effect as to every signatory, respectively, after six months and one year from receipt by Switzerland.²⁶ The Swiss Government shall communicate these acts to every signatory. The Kellogg Pact of August 27, 1928, for Renunciation of War provides (Article 3) that it shall take effect as soon as all the instruments of ratification shall be deposited with the American Government. Adhesions shall take effect upon deposit with that government. The American Government shall notify all parties upon receipt of these instruments. International subjects other than signatories may be designated as depositories. The League of Nations is the depository for instruments concerning some conventions concluded under its auspices, such as the Geneva Convention of February 19, 1925, relating to Dangerous Drugs,²⁷ and the Geneva Convention of September 25, 1926, with the object of Securing the Abolition of Slavery and the Slave Trade.²⁸

III. No objection has been raised in principle by any member of the international community to the resort to agency in international relations. The

²⁵ Treaty between Italy and San Marino, of March 31, 1939, Art. 3.

²⁶ Arts. 32, 36 and 38. See also the Geneva Convention of the same date for the Treatment of Prisoners of War, Arts. 91, 94 and 96.

²⁷ Arts. 34, 35 and 38.

²⁸ Arts. 10, 11 and 12.

conclusion may then be drawn that agency is not inconsistent with international law nor with the structure of the international society. It may be based upon the general principle of international law which grants any member of the community of nations a sphere of international autonomy, including the power to represent or to be represented by another under certain conditions. But no general principles or norms governing agency as an established institution of international law can be found. In fact, neither from the general principles of international law²⁹ nor from the customary law can any definite rule on agency be discovered. And even considering the "general principles of law recognized by the civilized nations" (Article 38, par. 3 of the Statute of the Permanent Court of International Justice) as a third source of general international law, it would be still impossible to arrive at any sufficiently determined rule of international law on agency. The lack of uniformity existing among the rules governing agency in the principal civilized nations—which can easily be seen by comparison of the corresponding types of agency established by the countries of common law and of civil law—implies that any attempt to derive from them any general principles on this subject would fail.

In the absence of any general principle on international agency, this relationship must necessarily be based on an agreement between principal and agent. The consent of both parties is indispensable: without the principal's consent the agent has no authority, without the agent's consent the principal is unrepresented. Some domestic law systems have established, besides consensual agency, several types of agency immediately derived from law, independent of the consent of the parties or at least of the principal. These types of agency *ex lege* have been provided in order to allow certain individuals without the natural or legal capacity of acting, to enter into legal relations: *e.g.*, the father's agency for the minor child or the guardian's for the insane. In international law there is no need for these types of so-called legal agency. By the mere fact of existence, every subject of international law is privileged to participate in international transactions in person, through its own organs. The principle is assumed that every international subject has the capacity to enter directly into international intercourse. The exercise of its power may be restricted, and sometimes is, but only voluntarily with its own consent, either by a formal treaty or by tacit agreement. The principle is thereby not violated, since the restraint is by an act of the state itself, and is not an act imposed upon it.³⁰ Since no legal incapacity

²⁹ One source of international law different from the customary law and from the general principles of law recognized by civilized nations is to be found in some fundamental principles which are inherent in the structure of the international community. One of these principles, for example, is that every state, unless special obligations prohibit it, may resort to war for the protection of its own interests.

³⁰ The point of view accepted in the text is based upon the theory that the normal liberty of action, which international law grants to every member of the international community, can be restricted only with the consent of the member upon which the restriction is imposed.

to act may be attributed to any international subject, there is no place for an international agency *ex lege*.

From these premises it must be concluded that "international agency" is a descriptive, not a technical term of international law. It does not indicate a general institute of international law; it does, however, describe a large number of situations within the international community which have never been accurately defined by international law and yet which present common characteristics which may be clarified by appropriate classification. Owing to the absence of any general standard recognized by international law by which the relationship between the principal and the agent can be judged, the treaty or other agreement creating the relationship of agency becomes in each case the point from which the character and extent of the relationship of agency must be fixed.³¹ Any question arising from an actual relationship of agency between two international subjects must be decided upon its own merits, *i.e.*, according to the content of the specific agreement between principal and agent.³² The extent of authority of France as an agent of Tunisia can only be determined by virtue of the Treaty of Bardo, May 12, 1881, and of the Treaty of La Marsa, June 8, 1883.

IV. International agency is always incidental to a fundamental relationship between principal and agent.

Connected with protectorates are the present agencies of France for Cambodia, Annam, Tunisia and Morocco. The agencies of Great Britain for Palestine, and of France for Syria and Lebanon are incidental to Mandates of the League of Nations. The agencies of Denmark for Iceland and of Italy for Albania are collateral to relationships of real union.³³ Dependent

Qualified legal status, such as the protectorate and neutralization, involving restrictions of the international activity of the protected or neutralized state, can only exist in compliance with the express or implied consent of such states. It may happen that the state which agreed to these restrictions was not in a position to reject them: *e.g.*, Danzig, at the end of the World War, could certainly not have refused the Polish Protectorate. But this statement is a strictly political one, and does not refute the principle that, from a legal point of view, these restrictions are established with the consent of the state upon which they are imposed. The same applies to a defeated state that concludes an unfavorable peace treaty because it is no longer in the position to carry on the fight. This peace treaty, although imposed, is concluded with the consent of the defeated state according to the maxim "*Coactus voluit sed tamen voluit*." The conclusion is that a protected or a neutralized state is not a state incapable of displaying a full international activity; for legal incapacity of a subject means lack of ability to perform certain activities, while a protected or neutralized state is in a condition to perform these activities, but, having internationally bound itself, must refrain from so doing.

³¹ Since there exists a similarity of approach to the present problem, resort is made here to the terminology used by C. G. Fenwick, *Wardship in International Law* (1919), p. 5 ff. See also D. Anzilotti, *Corso di Diritto Internazionale* (1928), pp. 83-84.

³² In theory an international agency could be established also by usage, but the writer was unable to find any example of that kind.

³³ After the Italian intervention of April, 1939, and the ensuing arrangements between the two states, Albania has certainly maintained her international personality, which was mani-

upon economic unions are the agencies of France for the Principality of Monaco, of Belgium for Luxembourg and of Switzerland for Liechtenstein. The agency of one member of the Little Entente for the others was only one aspect of the general organization created by this regional understanding. Agency may also be based upon a mandate conferred by the representing on the represented subject. The institution of a mandate as originally outlined by the Roman law and by the civil law finds frequent application in international law.³⁴ It happens often that one state is charged by another to act for the benefit of the latter. In performing this commission the mandatory usually acts in his own name (*mandate without representation*). In some cases, however, an agency relationship is collateral to the mandate (*mandate with representation*). The mandatory Power acts in name of his mandant and the acts performed by the mandatory have an immediate effect for the mandant as if the latter had acted in person. A clear example of this is the charging of one state by another with the diplomatic protection of its citizens. Another is the appointment of a state by the signatories of a multipartite convention to act as depository of the instruments referring to the convention.³⁵

Agency is intended primarily to serve the purposes of the basic relationship to which it is incidental. As the international arrangements to which agency is attached have many and varied purposes, so will agency, which is subordinated to them, have different purposes. Agency is sometimes devised to establish the superiority of one state over another by giving to the agent the control of the international relations of the principal. Since the function of the agent consists not only in expressing but also in creating the declaration of intent for its principal, it may dispose at will of the conduct of foreign relations of the represented state, provided that the agency be a general and compulsory one. Therefore, agency is utilized in the Protectorates, Mandates of the League of Nations, and real unions, as between Albania and Italy, based on the subordination of one to the other. An agency designed for coöperation on a footing of equality rather than subordination, was exemplified in the economic agreement between Belgium and Luxembourg whereby Belgium, stipulating treaties for the Union, acted simultaneously and with identical legal effects for itself and Luxembourg. Delegated pro-

festes by such international acts as withdrawal from the League of Nations and the conclusion of several treaties with Italy. The latter have given rise to an international union between Albania and Italy which has no international personality and may be likened to some relationships of real union which existed in the past. In fact, the union, dominated by Italy, is based on the preëstablished common monarch and on the strong connection of the organizations of the two states. In some aspects, as the incorporation of the Albanian into the Italian Army, it is similar to the vassal relationship existing in the Ottoman Empire until the last century. For further details concerning the present international status of Albania, see G. B. Rizzo, *La Unione dell'Albania con l'Italia e lo Statuto del Regno di Albania* (1939).

³⁴ See Q. Wright, *Mandates and the League of Nations*, p. 375 ff. ³⁵ See *supra*, at § II.

tection of the citizens of one state by another is a means whereby one state grants international assistance to another. The agency exercised by the subject acting as a depository in a multipartite convention is hardly more than a procedural device designed to expedite and simplify the communication and to coördinate the effects of instruments concerning the convention.³⁶

The legal consequences which international agency aims to produce between principal and agent can also be produced through other legal devices. For instance, in a protectorate the control over the international relations of the protected state can also be established by an agreement that the protected state might perform any act directly, subject however to the approval of the protecting state. The protectorate of Great Britain over the Republic of Transvaal, which ended in 1892, is usually cited as an example of protectorate which did not provide for the representation of the protected state by the protecting Power. Under the Treaty of 1884, Great Britain reserved only a qualified control over the foreign relations of the Republic.³⁷ Agency is not collateral to the protectorate of Hedjaz over Azir,³⁸ nor to that of Germany over Slovakia.³⁹ Agency is then only a legal device, and only one of the different legal techniques which may be used for attaining the same ends in international relations.

V. As international acts do not in general require typical forms, no special form is required for the agreement creating an international agency. It may be established by a formal treaty between agent and principal; it may be based upon a *tacitum pactum*; it may even be inferred by implication from such facts as the tacit acquiescence of the principal to an agreement stipulated without its intervention between other subjects, whereby the latter designate one of them to act as an agent for it with regard to them. In this latter form were established the agencies of Austria, Prussia and Russia for Cracow; of Great Britain for the Ionian Islands, and of the Mandatory Powers for Palestine and Syria and Lebanon.⁴⁰

³⁶ Agency has been suggested as a device to secure permanent inequality between states. Within the Commission for the Revision of the Covenant of the League of Nations the proposal was made to admit as members of the League some small states, as San Marino and Liechtenstein, providing that they were represented at the Assembly by other states. Cf. Schücking, *Le Développement du Pacte de la Société des Nations*, in *Recueil des Cours de la Haye* (1927), Vol. 20, p. 376.

³⁷ Transvaal agreed to conclude no treaty or engagement with any state or nation other than the Orange Free State without the approval of Great Britain. Such approval was to be taken for granted if the latter did not notify within six months after it was brought to the attention of His Majesty's Government that the treaty was in conflict with British interests.

³⁸ The Treaty of Mecca of Oct. 21, 1926, provides that the Imam of Azir cannot enter any political negotiation with any other state or grant economic concessions (Art. 2), or declare war or make peace (Art. 3) without the approval of the King of Hedjaz.

³⁹ The Treaty of Protectorate of March 23, 1939, only reads (Art. 4) that "the Slovak Government will always conduct its policy in close coöperation with the German Government."

⁴⁰ The terms of the Mandates for Syria and Lebanon and for Palestine were defined by the Council of the League of Nations on July 24, 1922.

Since international agency is intended to function with relation to third parties, it is necessary that they be informed of the extent of the authority conferred upon the agent. No special form is provided as to the way in which an agency relationship is to be made known to the third parties. It is generally done through notification of the arrangement of which the agency is a part.⁴¹ Every international transaction is so closely connected with the special characteristics and qualities of each subject involved that each of them must necessarily know the other parties to whom rights and duties are to be assumed. There is no place in international law for the doctrine of the undisclosed principal.

Third parties which have been notified of an agency relationship may proceed to its formal recognition. Such recognition usually means only that the recognizing state has no objection to the agency so far as it is concerned. However, the recognition of an agency whereby the principal binds itself to treat with the third states only through the agent, creates the obligation of the recognizing state to treat with the principal only through the agent. A state which has recognized the agency of France for Tunisia would commit a wrong against France by treating directly with Tunisia. Not only acknowledgment of, but also consent by, the third state to the agency is necessary in case of delegated diplomatic protection of the citizens of another state.⁴²

Every subject of international law having in principle the full capacity of acting internationally may represent another or appoint another to represent it. This power may be limited through international agreements. A state having recognized France's agency for Tunisia could not agree to represent the latter. Nor could Tunisia appoint another state as agent with those powers already conferred upon France.

VI. In contrast to the system of domestic law where certain acts (as, for instance, a will) cannot be performed by an agent, no such restrictions as

⁴¹ For a typical example of this procedure, see the exchange of notes between Switzerland and Sweden, Oct. 31, 1919, whereby Switzerland notified that she had agreed to represent Liechtenstein with regard to Sweden, and the latter consented to this agency. Attached to the Swiss note was a copy of the note of the Government of Liechtenstein, dated Oct. 21, 1919, asking the Swiss Government to assume the representation of the interests of Liechtenstein in Sweden (Martens, *Nouveau Recueil Général*, 3rd Series, Vol. XXIII, p. 543).

⁴² E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), p. 471 ff. and cases therein quoted: "The question has been raised whether the local government must consent to the exercise of such delegated or substituted authority. In the absence of abnormal conditions when necessity or humanity requires prompt action and warrants a departure from strict rules, it is believed that the assent of the local government,—which as a rule is formally given upon request—is an essential condition." See also U. S. State Department Circular Instructions of Aug. 17, 1914, to Diplomatic and Consular Agents Entrusted with the Interests of Foreign Governments at War with the Governments to Which Such Officers Are Accredited, in this JOURNAL, Supp., Vol. 9 (1915), pp. 118-119: ". . . the care and protection of foreign interests in both peace and war is based upon the consent of both foreign governments concerned. The consent, having been freely given, may as freely be withdrawn by either. . . ."

to the manifestation of intent through the agent exist in international law.

When the agent is granted authority to perform any kind of international act on behalf of the principal, agency is called *general*. Instances of general agency are those existing between France and Annam; Denmark and Iceland; Italy and Albania. The Mandatory Powers act as general agents for the communities under Mandate A of the League of Nations.⁴³ Almost general is the representation of France for Cambodia, the latter having only reserved the right to grant directly, with the consent of the French Government, *exequaturs* to foreign consuls on its territory. As for Tunisia, it still maintains some theoretical autonomy: the Bey may still receive foreign diplomatic agents, but they communicate with him only through the General Resident, who is a French officer; the Bey could also theoretically conclude directly some international acts, but only with the consent of France. Substantially similar is the status of Morocco.⁴⁴

When the agent is granted authority to perform only certain functions or transactions on behalf of the principal, agency is *special*.

An international subject acts as an *active agent* when declaring to third parties the intent of its principal, *e.g.*, when lodging for it a diplomatic protest; it acts as a *passive agent* when receiving as addressee a declaration of intent from a third state aimed at its principal, *e.g.*, when acting as depository of the instruments concerning a multipartite convention.

VII. As to the capacity of the principal to act directly in international relations, agency may be classified as *optional* and *compulsory*.

Agency is *optional* when the principal has the privilege, but not the duty, to resort to the agent for the fulfillment of the functions for which the agent was appointed. In international law, optional agency is usually established for occasional and transitory contingencies and only in the moment in which they arise; the authority of the agent terminates as soon as the circumstances for which it was given come to an end. But in some cases optional agency is stipulated in advance and for extensive classes of activities. By Article 20 of the Treaty of Islamic Friendship and Arabic Brotherhood between Saudi Arabia and Yemen, of May 21, 1934, each of the contracting parties binds itself to authorize its representatives and its delegates abroad to represent the other contracting party in any way the latter desires, in any question and at any moment. Since, in optional agency, the authority is given for

⁴³ Instances of general international agency are those mentioned *supra* at § II: of France for Madagascar, under the Treaty of 1885, of Italy for Ethiopia, under the Treaty of Ucciali, of Japan for Korea under the Agreement of 1905, and of Poland for Danzig. Albania's representation by Italy provided for in the Treaty of London of April 26, 1915, would have been of this class.

⁴⁴ The only international activity left to the Ionian Islands was the granting of *exequaturs* to foreign consuls after consent of Great Britain. It was disputed whether the Republic of Cracow was left the right of active and passive legation with other states than the Protecting Powers. For questions raised on this point during the existence of the Republic, see E. Engelhard, *Les Protectorats Anciens et Modernes* (1896), p. 178.

the benefit of the principal, he may revoke it at any time and fulfill directly or through another agent the functions for the performance of which the agency was established. For instance, the delegated protection of the citizens of one state with regard to another state in case of breach of diplomatic relations, which is an instance of optional agency⁴⁵ for the benefit of the principal, terminates as soon as the diplomatic relations are reestablished, and the authority may be revoked even sooner.

International agency is compulsory when the principal assumes the obligation to perform only through the agent the functions for the fulfillment of which the agency was established. Thus compulsory agency not only creates the obligation of the principal to refrain from acting through another agent, but also implies its obligation not to act directly in the matters for which the authority was conferred. Thus Korea certainly acted unlawfully in 1907 when attempting to send its own delegation to the Hague Peace Conference, although it was at that time compulsorily represented by Japan. Usually international agency is agreed to be compulsory when established primarily to insure to the agent the control of the foreign relations of the principal. Compulsory agency is then always collateral to a broader relationship between the principal and the agent aimed to grant the latter a position of superiority with respect to the former (Protectorate, Mandate of the League of Nations, etc.). Although usually general, in accordance with the function which it intends to fulfill, compulsory agency may sometimes be special. Article 5 of the Treaty of Baghdad of October 10, 1922, between Great Britain and Iraq recognized the right of the King of Iraq to establish diplomatic agents in London and in such other capitals and places as may be agreed upon by the contracting parties; while Great Britain became entrusted with the protection of the citizens of Iraq where the King of Iraq was not represented.

In the absence of express provisions as to its character, the nature of the functions that the agent is appointed to fulfill is generally a clear indication whether agency is optional or compulsory. But in certain cases it is doubtful whether the agency of one state on behalf of another is to be regarded as compulsory or optional agency. It was disputed, for example, whether Article 17 of the Treaty of Ucciali, providing that "H. M. the King of Kings of Ethiopia consents to use the Government of H. M. the King of Italy for the negotiation of all matters with other Nations and Governments," established the duty or the mere privilege of Ethiopia to use Italy as her agent.⁴⁶ The question as to the optional or compulsory character of an agency relationship is only one of interpretation of the agreement of the parties, to be resolved in accordance with the principles of international law on the interpretation of treaties. The compulsory character of an agency implies a

⁴⁵ See the Circular Instruction of the U. S. State Department, cited in note 24.

⁴⁶ For ample information on the dispute, see W. B. Stern, "The Treaty Background of the Italo-Ethiopian Dispute," in this JOURNAL, Vol. 30 (1936), pp. 191-192.

restriction on the independence of the principal. "Restrictions upon the independence of States cannot be presumed."⁴⁷ The burden of proving the compulsory nature of an agency lies then, in case of dispute, upon the party so claiming.

The question has never been raised, to the knowledge of the writer, as to the validity of acts directly performed by the principal in spite of a compulsory agency.

VIII. The function of the agent should not be confused with that of the messenger (*nuntius*). While both agent and *nuntius* coöperate with another state in its relations with other international subjects, the activities they perform may be clearly distinguished. The agent is endowed with the power both of creating and expressing through its organs the intent which it declares for its principal; while the *nuntius* merely acts as the mechanical instrument for the transmission to the third parties of the declaration of intent which has already been created by the organs of the state with which it is coöperating. The *nuntius* contributes in no manner to the content of the declaration which it forwards: it is an international postman. Sweden and Switzerland acted as messengers for Germany and Austria-Hungary, respectively, in September-October, 1918, when forwarding their peace proposals to the United States.⁴⁸ The United States acted as a messenger between France and Prussia during the Franco-Prussian War of 1870-1871, when forwarding memoranda from Bismarck to Count Bernsdorff, the German Ambassador in London, thence to Mr. Motley, the United States Minister in London and thence to Mr. Washburn, the American representative in Paris, who turned it over to the Foreign Minister of France.⁴⁹ The extreme example of a state acting as a mere *nuntius* is that of Switzerland when delivering the Italian declaration of war to Germany on August 28, 1916, after the breach of diplomatic relations between these two countries. On the other hand when Switzerland as an agent concludes a treaty of commerce binding Liechtenstein, the treaty is negotiated, signed and ratified by Swiss organs.

IX. For the functioning of international agency two conditions are necessary: First, the agent must *intend* to act for his principal in order that the legal effects of its acts shall be imputed to the latter; second, the third parties must be made aware that the agent's acts shall produce their legal effects for the principal.

According to her own Consular Regulations the United States has several times extended her diplomatic protection to foreign seamen serving on American vessels. No agency exists here, for America *intended* to exercise her own right of protection and *did not intend* to act as an agent for the state of which the seamen were citizens. Nor did France, though acting under

⁴⁷ Permanent Court of International Justice, The Lotus Case, Publications of the Court, Series A, No. 10, p. 18.

⁴⁸ See the correspondence in this JOURNAL, Supp., Vol. 13 (1919), p. 73 ff.

⁴⁹ G. H. Stuart, American Diplomatic and Consular Practice (1936), p. 269.

the mandate of the other great European Powers when intervening in Syria in 1860, *intend* to act as their agent, as she intended the legal effects of the expedition to be imputed only to herself. Also, a third state interposing its good offices in a conflict between two other states cannot be deemed to be acting on their behalf, since its action is to be imputed to it alone.

As to the second point, no special forms are prescribed as to the way in which third parties are to be informed that the agent is acting in such capacity. This may be assumed from the nature of the acts performed, as when Great Britain grants her diplomatic protection to a Palestinian subject. In the Pablo Nájera case, decided by the French-Mexican Mixed Claims Commission, it has been held that France, when making a treaty for Syria by virtue of her treaty-making power as Mandatory Power, is not required to mention such authority *expressis verbis* in the convention.⁵⁰ But in doubtful cases some indication is required, otherwise the acting state is deemed to have acted for itself only. During the Crimean War between Great Britain and Russia, it was held by a British Prize Court in the case of the *Leucade* concerning the capture of Ionian ships engaged in trade with Russia, that in the absence of a clear intention on the part of Great Britain, the representing Power, to declare war also for the Ionian Islands, they were not involved in the war.⁵¹

X. No principle or rule of international law forbids that the agent be granted the power of appointing a sub-agent for the purpose of the agency. However, the authority of the agent does not necessarily include the power of sub-delegation. This power exists only if it has been granted by the principal. Therefore, in every case of international agency, the question whether sub-agency may be admitted can only be solved through the interpretation of the agreement between principal and agent governing the agency relationship. Each case has to be decided on its own merits.

In international law even more than in any system of national law, the relationship of principal and agent is a fiduciary one. Since every international transaction includes some element of discretion, the principal ordinarily relies upon the personal qualities of the agent. It is, then, to be presumed that the subject appointed to perform some functions cannot sub-delegate another subject to fulfill them on behalf of the principal, unless expressly authorized. This presumption applies even when international agency is established in the interest of the principal.

XI. In every system of national law agency is primarily a device enabling a person to perform, through another, acts which the former could not perform directly. The aim is, then, to enlarge the sphere of activity of the

⁵⁰ *Commission Franco-Mexicaine des Réparations, La réparation des dommages causés aux étrangers par des mouvements révolutionnaires* (1933); and H. Lauterpacht, *Annual Digest*, 1927-1928, p. 52.

⁵¹ 2 Spinks, 212; 164 E. R. 394. For differing interpretations of the condition of the Ionian Islands during the Crimean War, see H. A. Smith, *England and the Law of Nations* (1932), I, pp. 67-76. See also on this case Wheaton, *International Law* (1929), I, p. 87, and P. Heilborn, "*Jonishes Schiffsfall*," in *Wörterbuch des Völkerrechts* (1924), I, p. 593.

principal. Although in some cases domestic agency is established for the benefit of the agent or for the common benefit of the agent and the principal, in the great majority of cases it is, from the viewpoint of legal advantage, for the benefit of the principal.

The examples given in the preceding paragraphs prove that agency in international law has much more varied functions than in national law. It happens comparatively seldom that one state could not directly perform those acts for which the agency relationship was created; agency is very often resorted to for reasons other than the mere benefit of the principal. It is certainly for the principal's benefit when consisting of the delegated protection of its citizens abroad. Article 22 of the League of Nations Covenant provides that the representation of the communities under mandate should be exercised for the benefit of those communities. In these cases the agent which acts against the interest of its principal is internationally liable to the latter. But when established to gain control of the principal's foreign relations, agency is just as clearly in the agent's interest. An agency relationship incidental to the subordination of the principal to the agent is obviously instituted for the advantage of the latter. When established to secure a coördination of the international activities of the principal and the agent for common purposes (as in an economic union), agency is for the benefit of both. The representation by Poland of Danzig was a case of agency intended to balance, on a basis of equality, different interests of the subjects involved.⁵² Therefore, to resolve any conflict of interest between principal and agent, the purpose for which agency is established must be considered. It must be ascertained, through reference to the underlying legal relationship to which the agency is collateral, for whose advantage the authority was conferred.

Several techniques have been devised to prevent the agent from taking advantage of its authority in those cases where the agency relationship was established for the benefit of the principal or for the common benefit of principal and agent. The discretion of the agent is limited by giving to the principal the possibility of controlling the agent's conduct, for instance, by providing that the agent shall ask the advice or the consent of its principal before acting on its behalf. Clauses of this kind regulate the economic agency of Switzerland for Liechtenstein⁵³ and of Belgium for Luxembourg.⁵⁴

⁵² Convention between Poland and Danzig, Nov. 9, 1920, Arts. 3 and 6. As to the rules to be followed by Poland in the agency for Danzig in order to balance the interests of both parties, see the decision of Dec. 17, 1921, by the High Commissioner of the League of Nations (League of Nations Doc. C. 116. M. 69. 1922), and the advisory opinion of the Permanent Court of International Justice of Aug. 26, 1930, in the case of *The Free City of Danzig and the International Labor Organization* (Publ. of the P.C.I.J., Series B, No. 18, p. 13).

⁵³ Treaty of June 28, 1923, Art. 7. Liechtenstein had to be consulted in the conclusion of commercial treaties and customs agreements with Austria.

⁵⁴ Treaty of July 21, 1921, Art. 5. No treaty of commerce could be concluded or modified without the advice of the Government of Luxembourg.

Article 7 of the Union Act of November 30, 1918, between Denmark and Iceland, provided that: "the international agreements stipulated by Denmark after the enactment of the Union Act will not bind Iceland without the consent of her competent organs."⁵⁵ The agent's conduct may also be controlled by an international subject other than the principal: the control over the acts performed by the Mandatory Power on behalf of the communities under Mandate A is entrusted to the League of Nations. A High Commissioner for the City of Danzig was appointed by the League of Nations to supervise the relations between Poland and Danzig.⁵⁶

It is doubtful whether an international act performed by the agent in violation of such provisions, *e.g.*, without consulting the principal, binds the latter. Since these rules are intended primarily to affect only the relations between the principal and the agent and not those of the agent with the third parties, the answer should usually be in the affirmative. Consequently the acts performed by the agent against these provisions are effective and bind the principal but make the agent liable to him for having violated the rules regulating the agency relationship.

XII. As to the legal effects of international agency, it results from the foregoing considerations that the agent's acts bind the principal only in so far as they are within the authority conferred. Beyond these limits the agent's acts do not bind the principal, unless subsequently ratified by the latter. In the same way that international law admits agency, it also allows *negotiorum gestio*, which nevertheless is very rare. The legal requirements of *negotiorum gestio* are the same as those of agency, the only difference being that the principal's consent follows rather than precedes the action of the agent. Acts of *negotiorum gestio* in international relations were often performed by the United States during political troubles in Latin America. The United States did not await a request for protection from European or other governments, but instructed her diplomatic and consular representatives and, at times, her naval officers, to extend temporary protection, whenever needed, to the nationals of foreign countries.⁵⁷ As to the ratification of the gestor's act, it can ensue either in a formal way or by conclusive acts, such as the refund of the expenses incurred by the gestor in the course of his activity.

XIII. The acts performed by the agent within the limits of its authority bind the principal as if they had been personally performed by the latter. When acting within its power, the agent assumes no personal responsibility towards either the principal or the third parties. Logically no agent's

⁵⁵ For Albania's control of Italy's activities on her behalf, see Art. 2 of the Convention of June 3, 1939, for the Unification of the Diplomatic and Consular Services, and Art. 7, par. 2, of the Economic Convention of April 20, 1939.

⁵⁶ Arts. 3 and 6 of the Convention of Nov. 9, 1920. See also the resolution of the Council of the League of Nations of Sept. 6, 1929, concerning the "Procedure to be followed with regard to the second paragraph of Art. 6 of the Danzig-Polish Treaty of November 20, 1920" (League of Nations Official Journal, 1929, p. 1462).

⁵⁷ E. M. Borchard, *op. cit.*, p. 473.

liability should be assumed for acts directly performed by the principal. But this principle, obvious as it may seem, has been questioned in some decisions suggesting, by way of *dictum*, that international agency may be the source of an agent's particular liability for certain tortious acts personally performed by the principal state within its domestic jurisdiction. This theory would make the state acting as an agent responsible where the domestic organs of the represented state treat foreign citizens in a manner incompatible with its international obligations. This form of responsibility would usually be present in cases of general and compulsory agency on the ground that, since the agent has taken over all the international relations of the state committing the wrong, the complaints of the third states against the principal can be addressed only to the agent.⁵⁸ In the *Mavrommatis Concessions* case, the Permanent Court of International Justice, after having noted that the obligations resulting from the engagements of Great Britain as Mandatory Power are obligations which the administration of Palestine must respect, adds: "the Mandatory Power is internationally responsible for any breach of them since, under Article 12 of the Mandate, the external relations of Palestine are handled by it."⁵⁹ Similarly, in the *Aduana Vieja* case, decided on December 29, 1924, by the Anglo-Spanish Mixed Commission for the Claims in the Spanish Zone of Morocco, Spanish responsibility for the non-performance by the Moroccan authorities of an obligation which Morocco had assumed towards Great Britain, was affirmed, *inter alia*, on the ground that "the protecting power represents the Moghzen of Morocco in his foreign relations, and foreign states can address themselves only to the protecting state even in regard to so-called imperfect obligations."⁶⁰ But this theory is destitute of legal foundation.

⁵⁸ The Draft Convention on Responsibility of States for Injuries to Aliens, prepared by the Research in International Law of the Harvard Law School, this JOURNAL, Spl. Supp., Vol. 23 (1929), p. 145, reads as follows (Art. 3): "A state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions regardless of the extent to which the national government, according to its constitution, has control of the subdivision. For the purposes of this article, a dominion, a colony, a dependency, a protectorate or a community under mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision." The comment to this section reads: "This would seem an established rule of international law." Even assuming this statement to be correct, it cannot be denied that the responsibility of the protecting state or of the Mandatory Power for wrongs committed by the protected state or by the community under Mandate A, would differ from the liability of a state for wrongs committed by one of its political subdivisions or of its colonies. In the latter case, the basis of the state's responsibility rests on the ground that the political subdivisions or the colonies do not enjoy an international personality independent from the state to which they belong, and therefore that the wrongs they commit are international wrongs of the state of which they are a part; on the other hand, the protected states and the communities under Mandate A are subjects of international law respectively distinct from the protecting state and from the Mandatory Power.

⁵⁹ Publications of the Permanent Court of International Justice, Series A, No. 2, p. 23.

⁶⁰ *Réclamations Britanniques dans la Zone Espagnole du Maroc* (1925), pp. 176-181.

It is a fact that, whenever the state which has committed the wrongful act is internationally represented in a compulsory way by another, the third state which suffered the wrong can present its complaint only to the agent, since no direct relations exist between the offending and the offended states. But although the claim is addressed to the agent, the alleged responsibility is that of the represented state. In case of breach of diplomatic relations between the states A and B, a claim of the state A against B must be presented to the state C, which represents B in its diplomatic relations with A. But the original liability of the state B is not therefore imputed to C, its agent.⁶¹

The liability of a protecting or mandatory Power can never be based upon the agency relationship when the acts complained of, and for which an international liability of the agent is claimed, are acts which occurred within the domestic jurisdiction of the represented state, *e.g.*, unlawful revocation of concessions made to foreigners, denials of justice, etc. Inasmuch as agency is exclusively confined to the execution of international acts, and does not deal with acts within the domestic jurisdiction of the parties, a liability of the agent for acts committed within the domestic jurisdiction of the principal state cannot exist on the grounds of the agency relationship. Furthermore, international agency concerns the performance of acts by the agent for the principal, and has nothing to do with acts performed by the principal directly. If any responsibility could be charged on the representing states in the above-mentioned cases, it could never have been based upon the agency relationship. In fact, there did exist in all these cases a legal ground for the responsibility of the representing state. It was to be found in the basic relationship of protectorate or mandate to which the agency relationship was only an incident, entirely immaterial to the problem here examined. The provisions of a mandate or protectorate on which this liability can be based are those conferring on the representing states some power of control or interference, more or less extended, *with the internal activity* of the represented subject. In case of a wrongful act against a third state, committed by the subordinate state within its own jurisdiction, the dominant state can be held responsible in so far as it has the power to control or to interfere with the activity of the subordinate state. Thus, the superior state is responsible either for having forced or for not having prevented the dependent state from doing wrong. If, in a protected state, the exercise of the legislative function is dependent upon the consent of the protecting state, the latter, since it did not prevent the enactment although in a position to do so, would be responsible for the enactment of a law incompatible with the international obligations of the protected state. The following conclusions may be drawn:

(a) One state which internationally represents another, is not responsible for the wrongs directly committed by the principal, unless it had the power

⁶¹ See R. Ago, "*La Responsabilità indiretta nel Diritto Internazionale*," in *Archivio di Diritto Pubblico*, 1936, p. 11 ff., and the references cited there.

to prevent them. In the *Aduana Vieja* case, Spanish responsibility for the omission of the Moroccan authorities to fulfill their obligation toward Great Britain, *i.e.*, construction of the British consular residence, did exist, not by virtue of Spanish control over international affairs in the Spanish Zone of Morocco, but on the ground that Spain had control over the internal affairs of the Zone. In the *Adolph Studer* case, decided on March 19, 1925, by the British-American Claims Tribunal established under the Special Agreement of August 18, 1910, a claim for alleged damages arising from a deprivation of a grant of land and concessions by the Sultan of Johore was correctly brought against Great Britain, not because Great Britain internationally represented Johore, but on the ground that Great Britain controlled her internal affairs.⁶²

(b) On the other hand, the responsibility of one state for the acts of another, based on the superiority of the former over the latter, may be asserted even where no international agency exists between the parties, if the superior state had the power to prevent them.⁶³

(c) The superior state is obviously liable for wrongful acts which occurred within the jurisdiction of the represented state if they were performed by direct actions of the organs of the superior state. Thus, an international responsibility of France for a denial of justice towards foreigners in Tunisia should not be based on the ground that France represents or controls the Regency of Tunisia, but on the fact that in Tunisia the judicial power as to foreigners is reserved to French tribunals directly; hence, the responsibility of France would be derived from her own wrong and not from one committed by Tunisia. A careful analysis of the *Mavrommatis Concessions* case shows that the international liability with which Greece charged Great Britain was not a responsibility of the Mandatory Power for acts committed by Palestine, the community under mandate represented by Great Britain, but a responsibility of Great Britain for her own acts. In fact, at the first hearings, Greece contended that Great Britain was responsible because the Colonial Office at London granted to one Rutenberg certain concessions incompatible with those granted by Turkey to *Mavrommatis*, which the British Government, as Mandatory Power for Palestine and successor to Turkey, had to respect. In the second stage of the case, after the decision

⁶² Reported in F. K. Nielsen, *American and British Claims Arbitration*, under the Special Agreement concluded between the United States and Great Britain, August 18, 1910 (1926), pp. 459-471.

⁶³ C. Eagleton, *Responsibility of States in International Law* (1928), after remarking that "responsibility is measured by freedom from external control," writes (p. 25): "The degree of subordination in which one state is held by another may be such as to relieve the former of a certain portion of its responsibility towards other states." Compare Ago, *La Responsabilità*, *op. cit.*, p. 37. That the responsibility of the protecting state for the wrongs committed by the protected state exists only in so far as the wrongful act was one that the protecting state could have prevented, was clearly recognized in the *Robert Brown* case, decided on Nov. 23, 1923, by the British-American Claims Tribunal, reported in F. K. Nielsen, *American and British Claims Arbitration*, pp. 162-202.

of August 30, 1924, the Greek Government based the responsibility of Great Britain on the alleged wrongful act of the British High Commissioner in refusing to approve the plans presented by Mavrommatis and, on the contrary, renewing the concession to Rutenberg. The charges obviously referred to acts performed by British officers in their capacity as organs of the British Government; the wrongful acts were, therefore, acts to be directly imputed to Great Britain and with which Palestine had nothing to do.

XIV. Since international agency is based upon an international agreement, it terminates upon the abrogation of such agreement. Therefore, the principles and rules applying to the termination of international agreements apply equally to the termination of international agency.

The more frequent causes of termination of international agency are:

(a) *The lapse of time* for which the authority is given. Agency is *temporary*, when the authority is conferred for a specified time; it then terminates at the expiration of that period. The agency of Belgium for Luxembourg in economic matters was to last as long as the economic union between these two states: 50 years renewable. When only given for a specific occasion, authority ends when this situation no longer exists; for example, the delegated protection of the citizens of a belligerent state with regard to the enemy is to be considered as an instance of *contingent* agency which terminates as soon as the diplomatic relations between the belligerent states are reestablished. Agency is *permanent* when no time has been assigned for its termination. A permanent agency is usually agreed to be *perpetual* when connected with a state of subordination of the principal to the agent. There are cases in which agency is permanent but not perpetual, since no time is stipulated for the termination of the authority, but the parties have foreseen certain events, upon occurrence of which the relation shall end. Although no final time is established for the end of the representation of a community under Mandate A, it is understood that the mandate and the incidental agency by the Mandatory Power will cease when the Council of the League of Nations shall acknowledge the ability of the community under mandate to govern itself. In consequence of the acknowledgment of this ability in Iraq, the British Mandate for this community and its representation by Great Britain came to an end.

(b) *The fulfillment of the purpose* for which the authority is given. Authority conferred to perform a specific act such as the lodging of a diplomatic protest, or for the reaching of a specific aim such as the negotiation and conclusion of a treaty, comes to an end as soon as the act is performed or the result is accomplished.

(c) *The occurrence of a subsequent condition.*

(d) *The inability to fulfill the purpose of the agency.* The representation of Denmark for Iceland was terminated or at least suspended in April, 1940, when Denmark, being occupied by Germany, was no longer in the position to internationally represent Iceland. Direct diplomatic relations since then have been established between the United States and Iceland. The economic representation of Belgium for Luxembourg was terminated or at least suspended in consequence of the military occupation of both countries by Germany. On August 15, 1940, a brief official German news agency dispatch from Brussels declared that Luxembourg had been incorporated the same day within the Reich's customs borders and that the German customs

line had been moved to the Franco-Luxembourg and Belgian-Luxembourg frontiers.

(e) *The extinction of the principal, of the agent, or of the third party with regard to whom the agency was aimed to operate.* Representation of Danzig by Poland ended with the extinction of both principal and agent; the representation of Madagascar by France ceased with the extinction of the principal, when Madagascar lost her status as an international subject by becoming a French colony; the diplomatic representation of a belligerent by a neutral with regard to the enemy ends with extinction of the third party if the latter is conquered and absorbed.

(f) *A new agreement revoking the old one.*

(g) *In certain cases, the outbreak of war.*

(h) A peculiar manner in which agency may be terminated is the *revocation by the principal* or the *renunciation by the agent*. It is correct to assume that in international law the principal has power to revoke, and the agent to renounce the authority, although doing so is a violation of an agreement between the parties expressly denying the right to revoke or to renounce. The only effect of a provision in a treaty that the authority cannot be terminated by either party is to create liability for its wrongful termination.

THE ENFORCEMENT OF MULTIPARTITE ADMINISTRATIVE TREATIES IN THE UNITED STATES

BY HENRY REIFF

Professor of Government, St. Lawrence University

Beginning with participation in the Cape Spartel Light Convention of May 31, 1865,¹ the United States has become a party to about a hundred multipartite administrative treaties, including revisions and amendments of the same.² The number of parties to a treaty varies with the treaty, from three³ or four, as in the case of the Fur Seals Convention of July 7, 1911,⁴ to ninety, as in the case of the Universal Postal Convention concluded at Cairo, March 20, 1934.⁵ The agreements, usually technical in character, deal with a variety of humanitarian, economic, and cultural subjects, ranging from agriculture to whales. Many of these agreements, such as those dealing with postal matters,⁶ publicity of customs documents,⁷ and publication of customs tariffs,⁸ are primarily of concern to administrative services. Others, such as those on the unification of rules relating to assistance and salvage on the high seas,⁹ and bills of lading,¹⁰ concern immediately private interests. Still others, such as those on radio,¹¹ safety of life at sea,¹² sanita-

¹ 14 Stat. 679, U. S. Treaty Series, No. 245.

² Complete list of treaties to 1936 in Reiff, "The United States and International Administrative Unions," *International Conciliation*, No. 332, Sept. 1937, pp. 629-631. Several have been perfected since then; others are in process of being perfected. For the period since 1936, see *Treaty Information Bulletin* to June, 1939, and since then, the *Department of State Bulletin*; also, *List of Treaties Submitted to the Senate 1936* (State Department Publication No. 966) and the annual lists since then. For an excellent description of the origins and functions of these administrative organizations and brief accounts of the relation of the United States thereto, see L. F. Schmeckebier, *International Organizations in which the United States Participates* (Washington, D. C., Brookings Institution, 1935).

³ A Monetary Stabilization Arrangement concluded by the United States, Great Britain, and France, announced on September 25, 1936 (*Treaty Information Bulletin*, No. 84, Sept. 1936, pp. 15-17), has not yet been published as a formal executive agreement in that series. Belgium, The Netherlands, and Switzerland subsequently indicated their coöperation with this tripartite arrangement (*ibid.*, No. 87, Dec. 1936, pp. 15-17).

⁴ 37 Stat. 1542, U. S. Treaty Series, No. 564.

⁵ 49 Stat. 2741; also Post Office Print.

⁶ Up to 1936 there were nineteen such agreements, the first being that concluded at Berne, Oct. 9, 1874, establishing a General Postal Union, 19 Stat. 577. See list cited *supra*, note 2.

⁷ Signed May 3, 1923, Santiago de Chile, 44 Stat. 2547, U. S. T. S., No. 753.

⁸ Signed July 5, 1890, Brussels, 26 Stat. 1518, U. S. T. S., No. 384.

⁹ Signed Sept. 23, 1910, Brussels, 37 Stat. 1658, U. S. T. S., No. 576.

¹⁰ Concluded at Brussels, Aug. 25, 1924, 51 Stat. 233, U. S. T. S., No. 931.

¹¹ Beginning with that signed at Berlin, Nov. 3, 1906, 37 Stat. 1565, U. S. T. S., No. 568. For full list see note 2 *supra*.

¹² Signed May 31, 1929, at London, 50 Stat. 1121, U. S. T. S., No. 910.

tion,¹³ and industrial property¹⁴ contain provisions of great importance to both administrators and private interests. The number of such agreements concluded throughout the world has grown at a phenomenal rate since 1919.¹⁵ The United States alone has assumed obligations under nearly twice as many treaties since 1919 as it did in the period 1865-1914.¹⁶ The trend having been established and continued American participation being assumed, it is pertinent to inquire how the United States has enforced its obligations under such treaties thus far, with the view of correcting any shortcomings that may be evident in the past.

The complexity of such agreements, of course, varies, depending upon such factors as age, subject-matter, and necessity for detailed regulation. Thus, the Cape Spartel Light Convention, concluded May 31, 1865,¹⁷ and the Convention on the Protection of Submarine Cables, concluded March 14, 1884,¹⁸ are relatively simple. Some recent agreements, such as those on Statistics of Causes of Death, concluded June 19, 1934,¹⁹ and on the Pan American Highway, concluded December 23, 1936,²⁰ deal with readily delimitable subject-matters and are therefore also relatively simple. Where, however, the subject-matter of the agreement is extensive and there is great necessity for detailed regulation, very complex treaties result. Good examples of the latter, as well as of fine draftsmanship, are the Conventions of 1925 on Industrial Property,²¹ 1929 on Safety of Life at Sea,²² 1932 on Telecommunications,²³ and the 1934 Convention of the Universal Postal Union.²⁴

In general, the provisions of this more complex type of treaty fall into three principal groups. (1) Some provisions deal with the treaty as an instrument under international law, *i.e.*, its perfecting, revision, and termination, reservations and adhesions thereto, interpretation thereof and settlement of disputes arising thereunder, and the territorial scope of its operation. (2) Others deal with the union created by the treaty as a "going concern," *i.e.*, its structure, organization, functions, and maintenance, forming in effect

¹³ Beginning with that signed Dec. 3, 1903, at Paris, open to all governments, 35 Stat. 1770, U. S. T. S., No. 466; and that signed Oct. 14, 1905, at Washington, 35 Stat. 2094, U. S. T. S., No. 518, open to the American Republics. See list cited *supra*, note 2.

¹⁴ Beginning with that signed March 20, 1883, at Paris, 25 Stat. 1372, U. S. T. S., No. 379, open to all governments; and that signed Aug. 20, 1910, at Buenos Aires, 38 Stat. 1811, U. S. T. S., No. 595, open to the American Republics.

¹⁵ M. O. Hudson, *International Legislation* (6 vols., Washington, 1931-1937).

¹⁶ In the period 1864-1914, thirty-seven (including six postal); 1919-1935, nearly sixty (including at least thirteen postal).

¹⁷ Cited *supra*, note 1.

¹⁸ At Paris, 24 Stat. 989; 25 *ibid.*, 1424, 1425; U. S. T. S., Nos. 380, 380-1, 380-2, 380-3.

¹⁹ At London, 49 Stat. 3787, Exec. Agr. Ser., No. 80.

²⁰ At Buenos Aires, 51 Stat. 152, U. S. T. S., No. 927.

²¹ Nov. 6, 1925, The Hague, 47 Stat. 1789, U. S. T. S., No. 834.

²² *Supra*, note 12.

²³ Signed Dec. 9, 1932, at Madrid, 49 Stat. 2391, U. S. T. S., No. 867.

²⁴ Cited *supra*, note 5.

a "constitutional" or organic law for the international entity. (3) Still others create rights and duties designed to further the objects of the union, constituting, in a sense, "statutory" law for the members of the union. Within this last group, from the point of view of the state which has assumed the obligation of enforcement, there are (A) provisions which concern chiefly the acts of the Government or its agents, and (B) others which concern the acts of individuals. Among the more important of the former are those relating to the adoption of implementing legislation and administrative measures; the communication of information; intergovernmental coöperation; detection and prosecution of violators; designation of a national enforcement agency; and financial obligations. The provisions of immediate concern to individuals relate to both civil and criminal matters. They are either substantive or procedural in character, and can be classified for purposes of enforcement thus: (a) those referring to the municipal law of the enforcing state and incorporating it into the treaty régime; (b) those requiring the participating government to establish certain rules; and (c) those setting forth textually the rule to be applied by each contracting party.²⁵

As indicated above, these agreements regularly contain stipulations requiring the parties to adopt "legislation"²⁶ or to take the appropriate "steps" or "measures"²⁷ to render effective the provisions agreed upon. Such stipulations are superfluous in the sense that every agreement creating obligations contains an additional implied obligation upon the parties to enforce it by whatever means, reasonable and feasible, may be available to them.²⁸ The quality of performance under such treaties will, of course, vary from country to country, depending upon the mode of introducing the provisions into the municipal law, the organization and efficiency of the domestic administrative services, the national interest in maintaining the international régime, and the zeal of the officials charged with enforcement. Enforcement of this international legislation obviously does not end with introduction into the municipal order. Enforcement is a continuous process, analogous to and intimately correlated with the process of administering domestic law. Indeed, one of the objects of the periodic general and specialized meetings

²⁵ Cf. S. P. Ladas, *International Protection of Industrial Property* (Cambridge, 1930), p. 150.

²⁶ E.g., Art. 12 of the Convention on the Protection of Submarine Cables, cited *supra*, note 18. About twelve others of these treaties contain such stipulations.

²⁷ E.g., Art. 4 of the Agreement on Abolition of Import and Export Prohibitions, etc., Geneva, Nov. 8, 1927, 46 Stat. 2461, U. S. T. S., No. 811; and Art. 9 of the Telecommunications Agreement of 1932, *supra*, note 23. The vast majority of these treaties either require the taking of "necessary measures" or leave the matter of the mode of enforcement to the good judgment of the parties.

²⁸ See comment on *Pacta sunt servanda*, in *Law of Treaties*, this JOURNAL, Supp., Vol. 29, (1935), p. 977 ff.; also, H. W. Briggs, *The Law of Nations* (New York, 1938), Editor's Note, pp. 432, 434.

held under many of the unions established by these treaties is to encourage and induce better performance.²⁹

Within the compass of the present paper it is possible to discuss certain of the leading features only in the process of enforcing these treaties in the United States. Among those features are the rôle of the national administrative officials; the adoption of enforcing legislation; the effect of the "supreme law of the land" clause in Article VI of the Constitution; and the relation of the courts to the process. Other features, such as the application of the agreements to territories of the United States, the relation of the treaties to the States, the financial obligations involved in membership in the unions, and representation of the United States on the international agencies, though important, do not involve any presently insistent problems.

The increasingly important position of the administrator in the making and enforcing of domestic law is now well recognized.³⁰ The reasons are not far to seek. In the discharge of their duties under domestic law, administrators frequently experience difficulties resulting from the operation or absence of foreign law on the same subject or from the lack of working arrangements with foreign administrators confronted by similar difficulties. They have, therefore, a direct and professional interest, supplementing the interests of private economic and social groups, in the securing of suitable international administrative agreements in appropriate cases or in the improving of existing agreements.³¹ Examples of this administrative interest may be found in connection with the establishment of many of the existing unions, beginning with the Universal Postal Union in 1874,³² and with the improvement of several others, notably those on narcotics,³³ radio,³⁴ and sanitation.³⁵ The annual reports of the agencies charged with enforcement of one or more of these treaties, such as those of the Postmaster General beginning with that of 1862, the Patent Office, 1876, the Secretary of Commerce, 1903, the Surgeon General, 1872, the Register of Copyrights, 1899, the Commissioner General of Immigration, 1895, the Department of Agriculture, 1905, the

²⁹ Cf. J. G. Starke, "The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs," this JOURNAL, Vol. 31 (1937), p. 31; and H. S. LeRoy, "Treaty Regulation of International Radio and Short Wave Broadcasting," *ibid.*, Vol. 32 (1938), p. 719.

³⁰ Cf. L. D. White, *Introduction to the Study of Public Administration* (New York, 1939).

³¹ Bipartite agreements are frequently inadequate. See discussion in Reiff, *loc. cit.*, pp. 645-650.

³² At first called *General* Postal Union. Report of the Postmaster General, 1862, p. 6, and its appendix No. 10, pp. 48-49; Reiff, *loc. cit.*, p. 638; J. F. Sly, "The Genesis of the U. P. U.," *International Conciliation*, No. 233, Oct. 1927.

³³ Report of the Committee Appointed by the Philippine Commission to Investigate the Use of Opium and the Traffic Therein, etc. (War Department, Bureau of Insular Affairs, 1905), and other works cited in Reiff, *loc. cit.*, p. 639, as well as the Annual Reports on Traffic in Opium and Other Dangerous Drugs (U. S. Treasury Dept.), 1926 ff.

³⁴ Cf. I. Stewart, "The International Radiotelegraph Conference of Washington," this JOURNAL, Vol. 22 (1928), p. 28.

³⁵ See annual Reports of the Surgeon General of the United States, 1908 ff.

Federal Radio (now Communications) Commission, 1927, and the Bureaus of Navigation, 1884, Standards, 1902, Internal Revenue, 1880, Narcotics, 1926, Fisheries, 1904, and Air Commerce (now Civil Aeronautics Authority), 1926,³⁶ reveal that administrative officials participate in the formulation and enforcing of these treaties at some thirty separate steps, from conception of the idea for a treaty³⁷ to recommendation that an existing agreement be denounced.³⁸ The steps relating more directly to enforcement include: suggesting reservations to the Senate with the view to facilitating enforcement; drafting enforcing legislation; appearing before committees of Congress; adopting rules and regulations; applying the same; assisting the courts in prosecutions; communicating directly with other parties or with international bureaus on routine matters; cooperating with State officials; keeping the public and Congress informed; maintaining contacts with private interests affected by the treaties; recommending to Congress legislation for improved enforcement; reporting to Congress and the international agency on performance; rendering complaints to the State Department or, as the treaty may require, to the international agency concerning non-performance by other parties; recommending desirable changes in the treaty; and gathering data in preparation for the periodic conferences and revisions. Obviously, where an administrative agency has found participation by the United States in a treaty desirable from its point of view, there exists a natural incentive to proper performance in order to secure the reciprocal advantages assured by the treaty. If a judgment upon the quality of the performance by the administrative officers, based upon a survey of their own reports³⁹ and reports of special investigating bodies⁴⁰ covering the period appropriate to each treaty has any validity, it can be said that, except with respect to a few instances to be discussed later, the performance has been generally assiduous, and in the case of radio, narcotics, and sanitation, zealous.

In general, little new legislation is required for the purpose of making

³⁶ And other special reports of the same agencies as well as the regular annual reports of other agencies such as the Smithsonian Institution (in charge of the International Exchange Service), the Bureau of Foreign and Domestic Commerce of the Department of Commerce, etc.

³⁷ *Supra*, note 32.

³⁸ *Infra*, note 136.

³⁹ Reiff, *The United States and Multipartite Administrative Treaties* (Thesis, Harvard Univ., 1934), Chs. 8, 9.

⁴⁰ *E.g.*, the report of the commission of three appointed by the President in pursuance of an Act of Congress of July 4, 1898, 30 Stat. 431, to revise the statutes on patents, trademarks, etc., in so far as they related to extant treaty obligations of the United States. Report, Nov. 27, 1900, 56th Cong., 2d Sess., S. Doc. No. 20. For a complete detailed picture of the rôle of the administrator, as well as of other aspects of the enforcing process, resort must be had to hundreds of special departmental reports, collections of rules and regulations, statutes, Congressional hearings, reports, and documents, messages of the President, the diplomatic correspondence, proceedings of the international conferences and reports of the international agencies, etc. See Schmeckebier, *op. cit.*, for very serviceable bibliographies.

effective the provisions of one of these administrative treaties within the jurisdiction of the United States, because, as already suggested, such agreements are not usually entered into until it has been found that existing domestic law is inadequate to cope with the situation involved. Rarely is Congress required to legislate in enforcement of one of these agreements in a field in which it has not previously acted, as was the case with the Act of February 29, 1888, relating to the protection of submarine cables on the high seas,⁴¹ enforcing the Convention of March 14, 1884, on the same subject.⁴² Occasionally, where there is old or inadequate statutory provision, new and comprehensive legislation must be adopted. The Act of May 1, 1936,⁴³ enforcing the Convention for the Regulation of Whaling of September 24, 1931,⁴⁴ illustrates such a situation, the only existing law on the subject dealing with aspects other than the conservation of whales.⁴⁵ Legislation supplementing and amending existing provisions is frequently, though not regularly, necessary. Usually there is accumulated pertinent law (and regulations) which the administrative officials can apply in execution of provisions of a treaty or generally in enforcement of it immediately upon its becoming effective as an international obligation.

In relation to a particular treaty or class of treaties and the date of effectiveness of the same, legislative provisions can conveniently be grouped thus: (1) prior non-anticipatory; (2) prior anticipatory; (3) accompanying; or (4) subsequent.⁴⁶ Quantitatively, the largest group is prior non-anticipatory. This includes accumulated procedural and substantive provisions in the law governing a subject-matter, adopted not in anticipation of any

⁴¹ 25 Stat. 41.

⁴² *Supra*, note 18.

⁴³ 49 Stat. 1246.

⁴⁴ 49 Stat. 3079, U. S. T. S., No. 880.

⁴⁵ U. S. Code, 1934 Ed., Tit. 46, Secs. 280, 569, 666, 667, 671, carrying forward statutory provisions of 1840, 1872, and 1886 relating to whaling vessels and seamen; Tit. 26, Sec. 999a, based on acts of 1932 and 1934 relating to a processing tax on whale oil.

⁴⁶ Two other groups should be noted in passing: (5) Ancillary legislation. Thus, though the Universal Postal Conventions from the beginning have obligated parties to grant liberty of transit for foreign mails across their territory (Oct. 9, 1874, Berne, 19 Stat. 577); there is no express requirement that such mails shall be protected during transit, though, undoubtedly, fulfillment of the spirit of the convention would require such protection. Nevertheless, an old provision of law, R. S. 4013 (1878), gives foreign mails so in transit the same protection as mails of the United States. Much legislation of this character exists; its pertinence to a treaty obligation may be immediate or very remote; and it may often not be distinguishable from what may be required by a reasonable implication from such an obligation. It may, on close analysis, be merely (6) "extra-treaty" legislation. On subject-matters with which certain of these treaties are concerned, *e.g.*, safety of life at sea, sanitation, radio, labor, and the traffic in narcotics and in women and children, the United States has adopted legislation prescribing more exacting conduct or "higher" standards, operative within its jurisdiction, than those required by the corresponding treaty. For want of a better term, municipal law on the same subject as one of these international agreements, and neither essential nor ancillary to proper enforcement of the obligations contracted, may perhaps be called "extra-treaty," without any implication that it contains standards "superior" or "inferior" to those established by the treaty.

international agreement on the subject and available as a matter of routine to administrative officials in enforcing a treaty. Grants of such authority may in some instances be traced back to 1789, and for the most part it would be indistinguishable from the authority conferred upon agencies of government to administer the laws of the country. Two or three examples should suffice. Legislation dating from the first national quarantine law, Act of April 29, 1878,⁴⁷ was available to the Surgeon General of the United States in enforcing the Sanitary Convention of December 3, 1903.⁴⁸ Under an act of July 5, 1884,⁴⁹ the Bureau of Navigation already had authority to assign signal-letters to American merchant vessels, thus enabling it to meet a requirement of the Wireless Convention of November 3, 1906.⁵⁰ Statutes are occasionally enacted prior to and in anticipation of international regulation of the same subject-matter. Thus considerable legislation, beginning as early as 1792,⁵¹ has authorized the Postmaster General to make postal arrangements with foreign countries and provided for types of services to be embraced in agreements to be concluded *in futuro*.⁵² The law of February 9, 1909,⁵³ on the importation and use of opium was enacted to give the United States "clean hands" on the Shanghai Opium Commission (1909).⁵⁴ Two acts were adopted in 1912⁵⁵ before and expressly in anticipation of the ratification of the Wireless Telegraph Convention of November 3, 1906.⁵⁶ The Radio Act of February 23, 1927,⁵⁷ was passed not only to bring order out of the chaos of American broadcasting, but also in contemplation of action to be taken at the forthcoming conference in Washington the same year, at which a comprehensive convention was concluded.⁵⁸ Other instances involving such prior anticipatory legislation relate to oil pollution of navigable waters,⁵⁹ air commerce,⁶⁰ load lines,⁶¹ safety of life at sea,⁶²

⁴⁷ 21 Stat. 37; supplemented by Act of Feb. 15, 1893, 27 Stat. 451. ⁴⁸ *Supra*, note 13.

⁴⁹ 23 Stat. 118, 119, sec. 3; Report, Comm. of Navig., 1911, p. 53. ⁵⁰ *Supra*, note 11.

⁵¹ Act of Feb. 20, sec. 26, 1 Stat. 239.

⁵² *E.g.*, Acts of March 3, 1851, par. 2, 9 Stat. 589; June 8, 1872, 17 Stat. 304, pars. 103, 197, 273. ⁵³ 35 Stat. 614.

⁵⁴ Hamilton Wright, Report on the International Opium Commission, etc., Sen. Doc. 377, 61st Cong., 2d Sess. (1910), p. 54.

⁵⁵ July 23, 1912, 37 Stat. 199; and Aug. 13, 1912, 37 Stat. 304. Report, Comm. of Navig., 1912, p. 40; 1913, p. 28.

⁵⁶ *Supra*, note 11.

⁵⁷ 44 Stat. 1162.

⁵⁸ *Supra*, note 34.

⁵⁹ Act of June 7, 1924, 43 Stat. 604; Preliminary Conference on Oil Pollution of Navigable Waters, Washington, June 8-16, 1926 (Washington, D. C., 1926). No treaty has resulted as yet.

⁶⁰ Act of May 20, 1926, 44 Stat. 568; the Pan American Convention on Commercial Aviation, Havana, Feb. 20, 1928, 48 Stat. 1901, U. S. T. S., No. 840.

⁶¹ Act of March 2, 1929, 45 Stat. 1492; the Load Line Convention of London, July 5, 1930, 47 Stat. 2228, U. S. T. S., No. 869.

⁶² Act of June 24, 1910, 36 Stat. 629; requiring ocean-going steamers carrying passengers to be equipped with radio apparatus; the unratified Safety of Life at Sea Convention of London, Jan. 20, 1914, Report on Conference, 63d Cong., 2d Sess., Sen. Doc. No. 463 (1914); Report, Comm. of Navig., 1910, p. 27.

and copyright.⁶³ Examples of legislation accompanying ratification of an agreement are the Carriage of Goods by Sea Act,⁶⁴ approved on April 16, 1936, enforcing the Bills of Lading Convention, concluded August 25, 1924,⁶⁵ ratified subject to an understanding April 16, 1936,⁶⁶ and ratified again subject to a further understanding, May 26, 1937;⁶⁷ and two laws approved, respectively, March 29, 1939,⁶⁸ and July 17, 1939,⁶⁹ making effective the provisions of the Convention Concerning the Minimum Requirement of Professional Capacity for Masters and Officers on Board Merchant Ships, adopted by the International Labor Conference October 24, 1936, ratified by the United States September 1, 1938, and effective October 29, 1939.⁷⁰

The general practice, until recently, has been to adopt enforcing legislation at a time subsequent to the date of the effectiveness of one of these treaties for the United States. Many such statutes or resolutions expressly state in their titles or in some provision that they are intended to "give effect to" or to carry "more fully . . . into effect" the provisions of the treaty mentioned.⁷¹ For the most part, however, subsequent enforcing legislation is not earmarked as such, and its relation to a prior treaty is a matter of inference from its own terms, the work of the Congressional committees, debates in either House, or administrative reports. This is true with respect to a large amount of enforcing legislation on patents, trade-marks, other industrial property, copyright, narcotics, sanitation, radio, white slavery, safety of life and property at sea, and postal matters.

If the introduction of a treaty into the municipal order of the United States were merely a matter of articulating the prior non-anticipatory and the anticipatory legislation with the provisions of the treaty on the same subject and of adopting accompanying or subsequent legislation, the task of enforcement would be relatively simple. It is relatively so simple in

⁶³ Act of March 4, 1909, 35 Stat. 1075, par. 8 proviso; the Pan American Copyright Convention of Buenos Aires, Aug. 11, 1910, 38 Stat. 1785, U. S. T. S., No. 593.

⁶⁴ 49 Stat. 1207; also textually reprinted as part of "Related Papers" in U. S. T. S., No. 931, p. 36 ff.

⁶⁵ 51 Stat. 233, U. S. T. S., No. 931.

⁶⁶ T. I. B., No. 79 (April, 1936), p. 19.

⁶⁷ T. I. B., No. 92 (May, 1937), p. 23. Cf. "Related Papers" in U. S. T. S., No. 931, at pp. 34-36, 51.

⁶⁸ Public No. 16 (H. R. 950), 76th Cong., 1st Sess.

⁶⁹ Public No. 188 (H. R. 3576), *ibid.*

⁷⁰ Department of State Bulletin, July 29, 1939, pp. 86-89.

⁷¹ *Purpose expressed in title:* E.g., Act of Feb. 29, 1888, 25 Stat. 41, to carry into effect, the Submarine Cables Convention; Act of Aug. 24, 1912, 37 Stat. 499, also J. R. of June 22, 1916, 39 Stat. 236, the Fur Seals Convention of Washington, July 7, 1911, 37 Stat. 1542, U. S. T. S., No. 564; the Whaling Treaty Act of May 1, 1936, cited *supra*, notes 43, 44.

Purpose of part of an act expressed therein: E.g., Act of June 25, 1910, 36 Stat. 825, par. 6, the White Slavery Agreement of Paris, May 18, 1904, 35 Stat. 1979, U. S. T. S., No. 496; Act of Jan. 12, 1895, 28 Stat. 601, par. 54, assignment of a number of Congressional documents for international exchange.

Great Britain (and certain other countries), where a treaty "affecting the rights of citizens, or existing statutes, is not completed with regard to the municipal legal order, until an act of Parliament is passed to render its provisions effective."⁷² Not so in the United States. Article VI of the Constitution, by conferring upon treaties when made status as "supreme law of the land," regrettably complicates the process. The constitutional provision was adopted primarily to assure compliance by the States with national treaty obligations.⁷³ That is a relatively minor problem now.⁷⁴ The provision still operates, however, to create for purposes of enforcement two categories of treaty stipulations: those which are "self-executing", *i.e.*, stipulations so intended and so phrased as to provide a rule which the courts⁷⁵ (or administrative officials)⁷⁶ can apply in appropriate cases "without the aid of any legislative provision";⁷⁷ and those which are "non-self-executing", *i.e.*, either stipulations of an "executory" character importing a contract to be performed by the legislature⁷⁸ (or the executive where competent),⁷⁹ or stipulations containing statements of fact or attitude requiring no action at all to be taken.⁸⁰ Theoretically a self-executing and an executory provision should be readily distinguishable. In practice it is

⁷² Ladas, *op. cit.*, p. 152.

⁷³ C. K. Burdick, *Law of the American Constitution* (New York, 1922), pp. 73-74; S. B. Crandall, *Treaties: Their Making and Enforcement* (Washington, 1916), Ch. XI.

⁷⁴ *Ware v. Hylton*, 3 Dall. 199 (1796), early settled the question of the supremacy of treaties over acts of the States. Crandall, *op. cit.* Cf. *U. S. v. Belmont*, 301 U. S. 324, 331 (1937).

⁷⁵ *Foster v. Neilson*, 2 Peters 253, 314 (1829).

⁷⁶ *The Peggy*, 1 Cranch 103, 109-110 (1801); *Cook v. United States*, 288 U. S. 102 (1933).

⁷⁷ Language of C. J. Marshall in *Foster v. Neilson*, cited *supra*.

⁷⁸ *Ibid.*

⁷⁹ Ordinarily, of course, the execution is by the legislature, since it is the principal law-making agency, but, in principle, any other agency with capacity to create law and possessed of jurisdiction over the subject-matter can execute. In practice, the President and his chief subordinate executive officers regularly execute, by means of their rule-making powers, numerous provisions of these administrative agreements. Treaties providing for the concluding of subordinate regional or bipartite agreements in pursuance of the general scheme of the multipartite arrangement clearly invite the use of the President's executive agreement-making power in execution of the treaty. See Art. 13 of the Madrid Telecommunications Convention, cited *supra*, note 23. Conventions of the postal, industrial property, sanitary, load-line, Pan American aviation, and several other unions regularly contain such provisions. Such agreements, made in pursuance of authority granted expressly by Congress or derived from Art. II of the Constitution, become law of the land, and, if self-executing, they can be applied in the same manner as an Act of Congress. *Cotzhausen v. Nazro*, 107 U. S. 215 (1882).

⁸⁰ *E.g.*, the first clause in Art. I of the General Pact for the Renunciation of War, Paris, Aug. 27, 1928, 46 Stat. 2343, U. S. T. S., No. 796, reading: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies . . ." Another type of non-self-executing provision is, of course, an "executed" one. These raise no special problems in enforcement with respect to the class of treaties under discussion.

difficult. John Marshall found it so ⁸¹ and the courts since then have often had similar experiences.⁸²

If there were a system of prior advisory opinions in use in the Federal courts, enforcement of treaties generally might be facilitated by securing early definitive judicial pronouncements upon the character of a treaty stipulation. In the absence of such a system, the character of a provision cannot be definitively determined until litigation brings it to the Supreme Court. That often is an unfair burden upon private litigants and it also unduly delays proper enforcement in some instances.

Aware of this situation, and with special reference to the particular agreements under discussion, various agencies of the Federal Government, aside from the courts, have from time to time in practice made preliminary determinations upon the character of a provision, deciding, until reversed by a court, that the provision is either self-executing or executory. Congress does this regularly when adopting enforcing legislation; ⁸³ the President does it implicitly when in his messages he asks Congress for legislation to enforce a treaty;⁸⁴ the Secretary of State has undertaken to do it in diplomatic correspondence with other governments; ⁸⁵ special commissions established by the President ⁸⁶ or by Congress ⁸⁷ for the purpose of studying existing legislation in relation to treaty obligations have on occasion done so; and the Attorney General on request,⁸⁸ and administrative officials frequently in the routine course of their work,⁸⁹ have also made such determinations.

⁸¹ Art. VIII of the treaty of 1819 with Spain held not self-executing in *Foster v. Neilson*, *supra*; after examination of the Spanish text, held self-executing in *U. S. v. Percheman*, 7 Peters 51 (1833), Marshall rendering the opinion in both cases.

⁸² See E. D. Dickinson, "Are the Liquor Treaties Self-Executing?" this JOURNAL, Vol. 20 (1926), p. 444, and the scholarly and exhaustive opinions in *American Express Co. v. United States*, 4 Ct. Customs App. 146-185 (1913).

⁸³ The decision is made implicitly. Cf. note 70, *supra*.

⁸⁴ *E.g.*, in the President's Annual Message of December 4, 1893, reminding Congress of the need for legislation to enforce the African Slave Trade Agreement of 1890 with respect to the arms and liquor traffic. II Moore's Digest 471.

⁸⁵ See, *e.g.*, reply of Secretary of State Bayard to an inquiry from the British Government concerning the manner in which the Industrial Property Convention of 1883 was being given effect in the United States, Jan. 18, 1889, II Moore's Digest 42-44.

⁸⁶ *E.g.*, a commission appointed by President Theodore Roosevelt on Revision of Laws relating to Safety of Life at Sea reported on Feb. 8, 1909, 60th Cong., 2d Sess., Sen. Doc. No. 701, its findings undoubtedly facilitating the adoption of the Act of Aug. 1, 1912, 37 Stat. 242, which "harmonized" the law of salvage with the provisions of the Agreement on Assistance and Salvage, Brussels, Sept. 23, 1910, 37 Stat. 1658, U. S. T. S., No. 576.

⁸⁷ *Supra*, note 40.

⁸⁸ *Infra*, note 102.

⁸⁹ *E.g.*, the report of the Commissioner of Navigation, 1913, p. 8, referring to the Radio Convention of 1912, 38 Stat. 1672, U. S. T. S., No. 581, which by its own terms became effective on July 1, 1913, states: "the Department of Commerce, with the coöperation of the Navy Department, War Department, and the Revenue Cutter Service of the Treasury Department, began the enforcement of its self-executing provisions on Sept. 1, 1913, the earliest date at which the necessary preliminary arrangements could be completed."

One agency defers to another.⁹⁰ There appears to be no rule of law conferring upon a single agency, apart from the Supreme Court, authority to make a final determination.⁹¹ Meanwhile, a treaty can remain inadequately enforced. Instances appear in the record of the execution of stipulations of these administrative treaties where there has been delay,⁹² some of it excessive,⁹³ or partial⁹⁴ or complete⁹⁵ failure to perform the task properly.⁹⁶

The introduction of the 1883 Convention for the Protection of Industrial Property, together with its revisions,⁹⁷ into the municipal order of the United States clearly illustrates the nature of the hazard under Article VI of the Constitution. The question whether certain of the provisions are self-executing has given rise to considerable litigation since American adhesion on May 30, 1887. The story is long and complicated. Suffice it to say that the history, terms, and nature⁹⁸ of the provisions, the practice of most other members of the union concerning them,⁹⁹ and the opinions of several of the lower Federal courts¹⁰⁰ construing them, all support the view that they are self-executing. Secretary of State Bayard¹⁰¹ and Attorney General

⁹⁰ *E.g.*, in *Cameron Septic Tank Co. v. City of Knoxville*, 227 U. S. 39 (1913), the Supreme Court deferred to the view of Congress that the Industrial Property Convention of 1883 was not self-executing. The view of Attorney General Miller to the same effect, *infra*, note 102, was adhered to by the Patent Office and affirmed in 1903 by the Court of Appeals of the District of Columbia, in *Rousseau v. Brown*, 21 App. Cases 73. *Crandall, op. cit.*, pp. 236-237.

⁹¹ The Act of June 12, 1934, 48 Stat. 943, which repeats the provisions of law authorizing the Postmaster General to make postal agreements, subject to approval of the President, and which provides that "The decisions of the Postmaster General construing or interpreting the provisions of any treaty or convention which has been or may be negotiated and concluded shall, if approved by the President, be final and conclusive upon all officers of the United States," is not an exception, because the determination is conclusive only upon officers of the United States and not private parties before the courts.

⁹² It may be necessary and *bona fide*. See Reports, Comm. of Navig., 1913, p. 28, with respect to the London Radiotelegraph Convention of 1912; also, Register of Copyrights, 1929, p. 24, with respect to probable membership in the Berne Copyright Union. The delay may be otherwise. See charges by E. S. Rogers concerning legislation necessary to enforce treaty obligations with respect to trade-marks and other industrial rights, Hearings on H. R. 13486, 69th Cong., 2d Sess., Jan. 6, 1927.

⁹³ *Infra*, note 154.

⁹⁴ *Infra*, discussion at notes 151, 152.

⁹⁵ *Infra*, notes 148, 149.

⁹⁶ As by the attachment of conditions or qualifications. *Infra*, note 102.

⁹⁷ Cited, notes 14, 156, 157; also revisions of Washington, June 2, 1911, 38 Stat. 1645, U. S. T. S., No. 579; and The Hague, Nov. 6, 1925, 47 Stat. 1789, U. S. T. S., No. 834.

⁹⁸ Set forth in *Ladas, op. cit.*, Ch. 7; *Cameron Septic Tank Case*, cited *supra*, note 90; *General Electric Co. v. Robertson*, 21 F. (2d) 214 (1927); *ibid.*, 25 F. (2d) 146 (1928); *Robertson v. Gen. Elec. Co.*, 32 F. (2d) 495 (1929).

⁹⁹ *Ladas, op. cit.*, pp. 150-151.

¹⁰⁰ Judge Putnam for C. C. A. (First Circuit) in *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, 155 Fed. 842 (1907); Judge Archbald for C. C. A. (Third Circuit) in *Hennebique Const. Co. v. Myers*, 172 Fed. 869, 889-890 (1909); and the highly persuasive view of Judge Soper, D. C., in *Gen. Elec. Co. v. Robertson*, 21 F. (2d) 214 (1927).

¹⁰¹ *Supra*, note 85.

Miller¹⁰² in 1889, the Patent Office¹⁰³ ever since, Congress¹⁰⁴ at various times, and certain others of the lower Federal courts¹⁰⁵ have regarded the same provisions as not self-executing. The Supreme Court has not yet ruled specifically upon the question.¹⁰⁶ Much *obiter* and some faulty analogies¹⁰⁷ drawn from the differing practices of other countries when introducing treaties into their municipal law, have beclouded the issue. The net results have been this recurring private litigation and charges intimating that the United States has not fulfilled its obligations.¹⁰⁸

Although cases frequently appear in the State and Federal courts directly involving bipartite treaties,¹⁰⁹ relatively few cases have been adjudged which directly implead one or another of these multipartite administrative agreements. Since 1865 there have been probably not more than thirty such cases, and many of these have arisen under the industrial property conventions.¹¹⁰ Several explanations of this record may be offered.

¹⁰² On April 5, 1889, Attorney General Miller gave it as his opinion that Art. 2 of the Industrial Property Convention of 1883, which provided for "national" treatment, was not self-executing but executory, and, furthermore, that it was conditioned upon reciprocity. 19 Op. Atty. Gen. 273. It remained necessary, therefore, for Congress to amend R. S. 4902 to give the foreigner (in this case, a Swiss) the same right to file a *caveat* as the citizen of the United States had; and Congress might refuse to so amend R. S. 4902 until it was assured of reciprocity for American citizens with respect to filing *caveats* under Swiss law. Ladas, *op. cit.*, p. 171, states that the provision was intended by the parties to be "common legislation" for the union, i.e., "self-executing" in American terminology, and, pp. 155-156, not conditioned on reciprocity. (Sec. 4 of the Act of March 3, 1903, 32 Stat. 1225, 1227, amended R. S. 4902 and extended the privilege to any person.)

¹⁰³ Ladas, *op. cit.*, p. 155. The other administrative agencies of the Government are in no position to deviate from this opinion. See note 3, in J. L. Brown, *Industrial Property Protection Throughout the World* (Dept. of Commerce, Trade Promotion Series, No. 165, Washington, 1936), p. 162.

¹⁰⁴ Legislation cited and discussed in Judge Soper's opinion, p. 220, cited *supra*, note 100.

¹⁰⁵ *Rousseau v. Brown*, at p. 76, cited *supra*, note 90, followed by others cited and approved by Judge Parker, C. C. A. (Fourth Circuit), in *Robertson v. Gen. Elec. Co.*, cited *supra*, note 98.

¹⁰⁶ *Cameron Septic Tank Co. Case*, *supra*, note 90. ". . . The Supreme Court was careful not to say that the Treaty of Brussels was not self-executing. On the contrary, it explained that it was immaterial whether the treaty was self-executing or not"—i.e., for the purposes of deciding that particular case. Language of J. Soper, cited *supra*, note 100.

¹⁰⁷ Judge Soper, *loc. cit.*, p. 220, pointed out the misconception placed by Congress and others upon the adoption of legislation by other members of the Union (see 57th Cong., 2d Sess., H. Rep. No. 3426, Jan. 31, 1903). The Supreme Court in the *Cameron Case*, at p. 49, noted the construction of Congress but did not undertake to approve or disapprove of it.

¹⁰⁸ Ladas, *op. cit.*, p. 166, n. 2; also correspondence with Government of Switzerland quoted in the *Cameron case*, *supra*.

¹⁰⁹ See Crandall, *op. cit.*, *passim*.

¹¹⁰ Cf. Ladas, *op. cit.*, Ch. VII. To these may soon be added certain cases now pending in the courts involving libels filed against cargoes of whale oil aboard the ships *Frango*, *Ulysses*, and *Watertown*, processed from short whales in violation of the 1931 Whaling Treaty and the 1938 Act in enforcement thereof. Letter from Department of Justice to writer, Dec. 18, 1939. A number of cases involving damages to submarine cables have appeared in the

As indicated above in the analysis of the treaty stipulations, many of these agreements in their entirety and the remainder in varying degree contain stipulations which are of concern only to Congress, or to the treaty-making power, or to the permanent administrative agencies. They affect private rights and duties either not at all or only through enforcing legislation. Where stipulations are intended to affect private rights and duties, they are usually translated into municipal law, if executory, by means of statutes in execution of the obligation; if self-executing, by repetition in revisions and codifications of the domestic law on the subject-matter. Therefore, if a treaty has been properly introduced into the domestic order, both governmental agencies and private parties asserting rights or duties created under a treaty can ordinarily assert them in terms of the appropriate municipal law. Court proceedings in such a case will not necessarily reveal that a treaty obligation is involved. Numerous suits brought by such agencies as the Communications Commission¹¹¹ or the Narcotics Bureau¹¹² invoke merely municipal law when in fact they may also be enforcing a treaty obligation. Where, however, a treaty has not been properly introduced into the municipal order, as apparently was the case with the industrial property conventions discussed above, private parties claiming rights under it will plead it directly as against conflicting domestic legislation. The paucity of adjudicated cases directly involving these administrative treaties would indicate, then, that the agreements have on the whole been properly introduced into the municipal law. For the most part, however, the paucity is probably due to the fact that these treaties are enforced as a routine administrative matter, with customary administrative procedure and sanctions.

Before proceeding to an examination of the few instances of faulty performance by the United States, it should be pointed out that with respect to several agreements there have been difficulties attending performance which nevertheless cannot be regarded as involving infractions on the part of the United States. These instances may be grouped thus:

(1) *Disputed interpretation of treaty terms.* A dispute between the United States and Norway, concerning sea transit charges claimed by the latter for services rendered in the years 1914 to 1919 and involving construction of certain provisions of the Universal Postal Convention, Rome, May 26, 1906,¹¹³ was settled by arbitration within the Union in 1926.¹¹⁴ The sen-

courts, but in each instance the damage appears to have been inflicted within the territorial jurisdiction of the United States and therefore not within the jurisdiction defined by the relevant treaty.

¹¹¹ Cf. Annual Reports, under "Legal Division," "Law Department," or "Litigation," since 1927.

¹¹² See the numerous cases regularly discussed in the Annual Report on Traffic in Opium and Other Dangerous Drugs since 1926.

¹¹³ 35 Stat. 1639.

¹¹⁴ 51 *L'Union Postale* 50-60 (March, 1926).

tence of the arbitrators was applied to similar pending disputes with Sweden and Denmark. Balances found due were paid under the deficiency appropriation act of July 3, 1926.¹¹⁵

(2) *Disputed jurisdictional fact.* In 1932 the Netherlands Government, acting ostensibly under Article 11 of the Sanitary Convention of Paris, June 21, 1926,¹¹⁶ declared the port of Honolulu and the Islands of Hawaii plague infected. The United States replied that no plague had "occurred in Honolulu or on the island of Oahu, on which Honolulu is situated, since July 12, 1910"; that two small areas on other islands were indeed infected; but that reports of the situation and the measures taken had been duly made to the Paris Office, and that the Dutch declaration was not in accord with the provisions of Article 11.¹¹⁷

(3) *Tacit mutual abandonment of treaty object.* Under a Pan American convention signed at Santiago, May 3, 1923,¹¹⁸ providing that the parties employ "the Brussels nomenclature of 1913 in their statistics of international commerce, either exclusively or as a supplement to other systems," the United States, which had already used the nomenclature for some years previous, continued its use until commercial demand for it fell off and it appeared that a subcommittee of the Economic and Financial Committee of the League of Nations was making progress in devising a better system of nomenclature. The United States and other signatories of the convention participated in the League work on this matter.¹¹⁹

(4) *Municipal action desirable but not required by treaty.* Under the Convention for International Uniformity of Weights and Measures, Paris, May 20, 1875,¹²⁰ the adoption of the metric system by any party is optional. Previously an Act of Congress of July 28, 1866,¹²¹ had legalized the use of the metric system in the United States and had supplied a table of equivalents for such use.¹²²

(5) *Union-wide failure to fulfill treaty requirements.* A requirement under Article 5 of the Agreement on the Exchange of Official Documents, etc., Brussels, March 15, 1886,¹²³ that certain uniform models and formulas be "adopted" (by the parties) for use in effecting exchanges was never carried out. Many of the signatories have, however, adopted the forms used by the International Exchange Service of the Smithsonian Institution, the American treaty agency.¹²⁴

(6) *Perfecting agreement not put into operation by the parties.* A convention providing for the exchange of Official, Scientific, Literary, and Industrial Publications, elaborated at the Second International Conference of American States, signed at Mexico City, January 27, 1902, effective for parties

¹¹⁵ 44 Stat. 841, 863.

¹¹⁶ 45 Stat. 2492, U. S. T. S., No. 762.

¹¹⁷ T. I. B., No. 38 (Nov. 1932), pp. 8-9.

¹¹⁸ 44 Stat. 2559, U. S. T. S., No. 754.

¹¹⁹ League of Nations Doc. II. Economic and Financial Questions. 1928. II, 52; II *ibid.* 1931. II. A. 9.

¹²⁰ 20 Stat. 709, U. S. T. S., No. 378.

¹²¹ 14 Stat. 339.

¹²² Legislation formally legalizing the customary system of weights and measures in terms of the material metric standards adopted by the International Union after 1875 is, however, highly desirable. See Lyman J. Briggs, "A Proposal for Legislation to Fix the Standards of Weights and Measures in the United States," mimeo., U. S. Bureau of Standards, ca. 1937; and Hearings on H. R. 7869, 75th Cong., 1st Sess., before Committee on Coinage, Weights, and Measures, H. R., Aug. 12, 1937.

¹²³ 25 Stat. 1465, U. S. T. S., No. 381.

¹²⁴ Letter to the writer, from Smithsonian Institution, June 25, 1932.

other than the United States May 16, 1902, for the United States June 23, 1902,¹²⁵ was permitted to fall into desuetude. A new convention, however, was adopted by the Inter-American Conference for the Maintenance of Peace at Buenos Aires, December 23, 1936;¹²⁶ and coincidentally the United States arranged by means of executive agreements for exchanges with several of the American States.¹²⁷

(7) *Faulty instruments.* Where the scope of a treaty is too limited, the mechanical arrangements set up under it clumsy, its terms inadequate, or its language inept, unsatisfactory results from its operation obviously may be expected. Charges of such defects have been brought particularly against several of the Pan American conventions on trade-marks and copyrights concluded up to 1929.¹²⁸ Judgments concerning performance by the United States under such treaties should therefore be qualified by the known difficulty of discovering what obligations were imposed by the treaties. A good example of an excessively limited scope is that of the Agreement on White Slavery, Paris, May 18, 1904.¹²⁹ Concerning this the Commissioner General of Immigration wrote in 1910 that it was "practically worthless to this Government in preventing the migration of alien procurers and prostitutes. . . . The procurement of innocent women and girls for the purposes of debauchery has seldom, if ever, come to the attention of the bureau, and as it is the purpose of the treaty to prevent such procurement, the treaty usefulness ends there."¹³⁰

(8) *Supervention of events beyond control of the parties.* The World War rendered exceedingly difficult, in some cases made impossible, proper enforcement of many of these treaties, e.g., the London Radiotelegraph Convention of July 5, 1912.¹³¹ After the war, until the conclusion of the Washington Radio Convention of November 25, 1927,¹³² commercial broadcasting threw the air into general confusion.

(9) *Assumption of obligation merely to use influence.* The United States declared at the moment of signing the Agreement on the Unification of Pharmacopoeial Formulas for Potent Drugs, Brussels, November 29, 1906,¹³³ that it assumed no "other obligation beyond that of exercising its influence in order that at the next revision of the American Pharmacopoeia" the latter might be brought into harmony with the agreement. This it has done.¹³⁴

¹²⁵ U. S. T. S., No. 491-A.

¹²⁶ Pan American Union, Congress and Conference Series, No. 22, p. 43.

¹²⁷ With Peru, Exec. Agr. Ser., No. 103; Mexico, *ibid.*, No. 108; Chile, *ibid.*, No. 112; Cuba, *ibid.*, No. 123.

¹²⁸ See S. P. Ladas, *The International Protection of Trade Marks by the American Republics*, (Cambridge, 1929), *passim*, and the implied criticism in Art. 34 of the Convention on Trade Marks and Commercial Protection, Washington, Feb. 20, 1929, 46 Stat. 2907, U. S. T. S., No. 833.

¹²⁹ 35 Stat. 1979, U. S. T. S., No. 496.

¹³⁰ 61st Cong., 2d Sess., S. Doc. No. 214, Pt. 2 (Jan. 31, 1910), p. 14.

¹³¹ 38 Stat. 1672, U. S. T. S., No. 581. See Report, Comm. of Navig., 1915, p. 31, and I. Stewart, *loc. cit.*

¹³² 45 Stat. 2760, U. S. T. S., No. 767.

¹³³ U. S. T. S., No. 510.

¹³⁴ In the United States, in contradistinction to the practice in many other countries, the preparation and publication of pharmacopoeias is not under Government direction and control. However, the various Federal health services adopt them as standards for their official use, delegates from a limited number of the several departments attend the decennial meetings of the U. S. P. Convention; the Hygienic Laboratory publishes a Digest of Com-

(10) *Misapprehension of date of effectiveness.* In June, 1937, certain shipments of sugar were made from the Philippines to Hong Kong apparently in ignorance of their inconsistency with the requirements of the Protocol attached to the Agreement on the Production and Marketing of Sugar, signed at London, May 6, 1937, by representatives of both the Philippine Commonwealth and the United States, the Protocol being effective from the date of its signature until the entry into force of the Agreement. Prompt action halting the shipments having been taken by the Commonwealth, no controversy has arisen since.¹³⁵

In passing, it should also be pointed out that the United States has had cause for complaint concerning faulty performance by others. Thus, in 1921 the United States denounced the Paris Sanitary Convention of December 3, 1903, on the grounds that several of the European parties thereto, particularly Italy, had failed to give the notices of epidemics required thereunder.¹³⁶ Even under the 1926 revision of that treaty, delinquency in forwarding reports to the International Office at Paris has not been eliminated entirely.¹³⁷ Non-performance of this character has forced the United States to supplement the treaty service with an information service of its own, at its own expense, under its consular system and by stationing Public Health Service officers abroad.¹³⁸ Resolutions adopted at International Sanitary Conferences of the American Republics, probably at the behest of the Great Republic of the North, have urged the parties to the Pan American Sanitary Conventions¹³⁹ to furnish accurate and complete information to the Bureau at Washington, and to forward it "with regularity", as required by those treaties.¹⁴⁰ The head of the American delegation to the Second Opium Conference at Geneva in 1925 charged that the other principal signatories to the 1912 Opium Convention¹⁴¹ had not properly met their obligations under that treaty.¹⁴² Again, recently, the American delegate to the League of Nations Opium Advisory Committee complained that Japan had failed to enforce properly the Convention on the Manufacture and Distribution of Nar-

ments and changes in the works; and the Pure Food and Drugs Act of June 30, 1906, 34 Stat. 768, as well as the Federal Food, Drugs, and Cosmetics Act of June 25, 1938, 52 Stat. 1040, adopted by reference the standards in those compilations as the standards to be applied in the administration of the acts. See Hygienic Laboratory Bulletin, Nos. 23, 75, and 107.

¹³⁵ New York Times, June 20, 1937. Text of Agreement and Protocol and Report of the delegate of the United States to the London Sugar Conference in 75th Cong., 1st Sess., Sen. Ex. T. (June 30, 1937); T. I. B., No. 92 (May, 1937), p. 19; *ibid.*, No. 102 (March, 1938), p. 67. Letter to the writer from Department of State, Oct. 28, 1937.

¹³⁶ Malloy, *Treaties, Conventions, etc.*, Vol. III, 67th Cong., 4th Sess., Sen. Doc. 348, pp. 2877-2879; Reports of the Surgeon General, 1911, pp. 119-120; 1912, p. 131; 1913, pp. 240-241.

¹³⁷ Reports, *ibid.*, 1927, p. 1; 1929, p. 120.

¹³⁸ *Id.*

¹³⁹ 35 Stat. 2094, U. S. T. S., No. 518.

¹⁴⁰ Report, Surgeon General, 1912, pp. 57-58.

¹⁴¹ Concluded at The Hague, Jan. 23, 1912, 38 Stat. 1912, U. S. T. S., No. 612.

¹⁴² Records of the Second Opium Conference, Geneva, Nov. 17, 1924-Feb. 19, 1925 (Geneva, 1925), 2 vols. League Doc. C.760.M.260.1924.XI, Vol. 1, pp. 114-117.

cotic Drugs concluded at Geneva, July 13, 1931.¹⁴³ Concerning the functioning of the International Institute of Agriculture, created by the convention signed at Rome, June 7, 1905,¹⁴⁴ Asher Hobson, American delegate to the Institute for a decade after the World War, has written:

. . . The Institute has failed in fulfilling its mission. . . . The governing body has been lax, not to say neglectful, in the discharge of its duties. . . . The Institute has become more political than technical. Diplomatic considerations tend to submerge those pertaining to the economic, social, and scientific. At times, diplomatic pressure tends to paralyze and render inoperative the machinery created by the Treaty for the control of the organization. . . .¹⁴⁵

In 1920, when most of the European countries were party to the Agreement of 1910 on the Repression of the Circulation of Obscene Publications,¹⁴⁶ the Postmaster General reported that much of such objectionable matter was coming from those countries.¹⁴⁷

The instances of faulty performance by the United States can conveniently be gathered under four heads: (1) *Failure to adopt required legislation.* Congress failed entirely to adopt the legislation controlling the arms and liquor traffic in Africa required by the African Slave Trade Agreement of Brussels, July 2, 1890.¹⁴⁸ Up to 1909¹⁴⁹ Congress failed to authorize the setting aside of copies of the *Congressional Record* for exchange purposes, as obligated by arrangements made under the Convention on Exchange of Official Journals, etc., of Brussels, March 15, 1886.¹⁵⁰ The Convention of 1884 on Protection of Submarine Cables, Article 7, provided for indemnification of owners of ships who could prove loss of anchor, gear, etc., to avoid injury to a cable, notice of the claim to be given "to the consular authorities of the nation to which the owner of the cable belongs."¹⁵¹ No Act of Congress provided for the enforcement of this provision. Congress also failed, after a reasonable delay, to amend the Wireless Act of Aug. 13, 1912,¹⁵² in the several respects necessary to bring it entirely into accord with the 1912 Convention.¹⁵³ (2) *Excessive delay in adopting required legislation.* Ten

¹⁴³ In 1936 and 1937. See League Doc. C.299.M.182.1936.XI; U. P. Hubbard, "The Cooperation of the United States with the League of Nations 1931-1936," *Int. Conciliation*, No. 329, pp. 363-372; and N. Y. Times, May 29, 1937; June 14, 19, 22, 27, 1938.

¹⁴⁴ 35 Stat. 1918, U. S. T. S., No. 489.

¹⁴⁵ The International Institute of Agriculture (Berkeley, Calif., 1931), p. x.

¹⁴⁶ Concluded at Paris, May 4, 1910, 37 Stat. 1511, U. S. T. S., No. 559.

¹⁴⁷ Report, Postmaster General, 1920, p. 125.

¹⁴⁸ 27 Stat. 886, U. S. T. S., No. 383. See II Moore's Digest of International Law 470-472.

¹⁴⁹ J. R., March 4, 1909, 35 Stat. 1169.

¹⁵⁰ 25 Stat. 1469, U. S. T. S., no. 382. The Smithsonian Institution had "endeavored on several occasions previous to the passage of the resolution to have the Congress take action in the matter." Letter, Smithsonian Institution to the writer, March 16, 1927.

¹⁵¹ *Supra*, notes 18 and 71, the Act of Feb. 29, 1888, containing no such authorization.

¹⁵² 37 Stat. 302.

¹⁵³ Report, Comm. of Navig., 1914, p. 23; 1915, pp. 30-31.

years after the United States had adhered to the Convention on Industrial Property, Paris, March 20, 1883,¹⁵⁴ Congress passed an act bringing the Federal legislation ostensibly into harmony with the convention.¹⁵⁵ Similar delays occurred after the ratification of the Supplementary Convention of Madrid, 1891,¹⁵⁶ and the Additional Act of Brussels, December 14, 1900.¹⁵⁷ Again, legislation permitting the registration of so-called "collective marks," required by the Berne Union and the Pan American Trade-Marks Convention of Washington, February 20, 1929,¹⁵⁸ was not adopted until June 20, 1936.¹⁵⁹ (3) *Failure to adopt necessary regulations.* No "consular regulations of the United States specifically authorizing consular officers to receive statements pursuant" to Article 7 of the Convention on Submarine Cables have been issued.¹⁶⁰ (4) *Failure to designate responsible administrative agency.* There appears to be at present no administrative agency specifically responsible for the proper enforcement of the Submarine Cable Convention.¹⁶¹

CONCLUSION

It is evident from the foregoing that improvement of the enforcing process is necessary and desirable. The simplest and most direct reform would consist in an amendment to Article VI of the Constitution preserving the supremacy of a treaty over acts of the States, but eliminating automatic status of a treaty as "law of the land" and requiring Congress to adopt a comprehensive enforcing statute before the agreement becomes operative infraterritorially.¹⁶² Such an amendment, however, is probably not feasible at present. Some improvement may nevertheless be achieved by the enumeration of self-executing stipulations of a treaty in a final act or pro-

¹⁵⁴ *Supra*, note 14. Accession announced to Swiss Confederation May 30, 1887.

¹⁵⁵ Act of March 3, 1897, 29 Stat. 693; Ladas, *International Protection of Industrial Property*, p. 155.

¹⁵⁶ 27 Stat. 958, U. S. T. S., No. 385.

¹⁵⁷ 32 Stat. 1936, U. S. T. S., No. 411. See Act of July 4, 1898, 30 Stat. 431; Sen. Doc. 20, 56th Cong., 2d Sess., Dec. 4, 1900; Act of March 3, 1903, 32 Stat. 1225; and Message of President Taft to Congress, May 10, 1912, 62nd Cong., 2d Sess., H. Doc. 749, recommending another commission of revision.

¹⁵⁸ *Supra*, note 14.

¹⁵⁹ 49 Stat. 1539.

¹⁶⁰ Letter to writer from Department of State, July 31, 1932. American cable companies, however, have settled directly such claims for indemnification in infrequent cases that have arisen, without the intervention of the Department of State. (Letters to writer from Western Union and Commercial Cable companies.)

¹⁶¹ Letters to writer from the Office of Naval Records and Library, Navy Department, March 26, 1927, and the Bureau of Navigation, Department of Commerce, July 11, 1932.

¹⁶² If any amendment is attempted, it should include changing the rule with regard to consent to ratification from two-thirds of the Senate to a simple majority of both Houses. So many treaties nowadays have the quality of statutes, certainly the hundred herein described, that the House of Representatives ought to be permitted to participate in the process. At present, it must coöperate in enforcing treaties dealing with many subjects within its legislative competence to which it has not given its formal consent.

tocol¹⁶³ and by resorting regularly to such practices as preparation of implementing legislation by the administrative services affected by the treaty, preparation of composite schedules of legislation by the Department of State,¹⁶⁴ appearance before the legislative committees by the appropriate administrative officers,¹⁶⁵ prompt publication of enforcing legislation and administrative regulations in the *Department of State Bulletin*,¹⁶⁶ designation by executive order of enforcing agencies where several are required,¹⁶⁷ and the rendering of separate reports on treaty enforcement.¹⁶⁸

¹⁶³ See Ladas, *op. cit.*, p. 173.

¹⁶⁴ *E.g.*, Comparative Print of (1) 1929 Convention for Safety of Life at Sea, (2) 1914 Convention on Safety of Life at Sea, and (3) United States Statutory Provisions Relating to Matters Covered by Above Conventions, Arranged in Parallel Columns. 1932. (Confidential, Printed for use of Senate Committee on Foreign Relations, 72d Cong., 2d Sess.) Also, in Hearings before the Committee on Foreign Affairs, H. R., 74th Cong., 1st Sess., on S. 3413 (1936). Cf. W. R. Vallance, "The International Convention for Regulation of Whaling and the Act of Congress giving Effect to its Provisions," this JOURNAL, Vol. 31 (1937), p. 112. The Bureau of Fisheries appears in this case to have directed the preparation of the draft legislation.

¹⁶⁵ Hearings on Berne Copyright Union, before Senate Committee on Patents, on H. R. 12549, 71st Cong., 3d Sess. (1931); before Senate Committee on Foreign Relations on S. 1928, 73d Cong., 2d Sess. (1934); and before a subcommittee, *ibid.*, 75th Cong., 1st Sess. (1937). Also, *supra*; note 164.

¹⁶⁶ *E.g.*, the legislation implementing the Convention relating to Masters and Officers on Board Merchant Ships, adopted by the International Labor Conference, Oct. 24, 1936, in Vol. I, No. 5, July 29, 1939.

¹⁶⁷ As was done in the case of the Safety of Life at Sea Convention of 1929, Exec. Order No. 7548, Feb. 5, 1937, T. I. B., No. 89 (Feb. 1937), pp. 12-14, and with respect to the several whaling agreements, Department of State Bulletin, March 30, 1940, p. 350, citing the Federal Register.

¹⁶⁸ As by the Bureau of Narcotics, *supra*, note 112, or the devoting of a special section of the regular annual report to the matter, as by the Communications Commission, the Public Health Office, the Register of Copyrights, the Commissioner of Navigation, and the Postmaster General.

EDITORIAL COMMENT

THE TRANSFER OF DESTROYERS TO GREAT BRITAIN

On September 3 President Roosevelt announced to Congress that the United States had received from Great Britain ninety-nine-year leases on certain naval bases in the Caribbean in exchange for fifty over-age destroyers.¹ The transaction has aroused some controversy in and out of Congress on grounds both of municipal law and international law. An opinion by the Attorney General dealing with these questions² accompanied the President's message.)

So far as the municipal law of the United States is concerned, the Attorney General's opinion appears to be conclusive, although on one point his reasons may not be entirely satisfactory. (The President has ample statutory authority to dispose of destroyers under the conditions which existed³ and he has ample authority under the Constitution to acquire naval bases by the method of executive agreement. Executive agreements have been utilized in practice for transactions of the type in question,⁴ and the broad independ-

¹ Department of State Bulletin, Sept. 7, 1940, Vol. III, p. 201; Supplement to this JOURNAL, p. 183.

² Department of State Bulletin, *loc. cit.*; this JOURNAL, *infra*, p. 728.

³ "No vessel of the navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing." (Act of March 3, 1883, Sec. 5, U. S. Code, Tit. 34, Sec. 492.) "The word 'unless' qualifies both the requirements of the concluding clause." (Levinson v. United States, 258 U. S. 198, 201.) "Notwithstanding the provision of any other law, no military or naval weapon, ship, boat, aircraft, munitions, supplies or equipment, to which the United States has title, in whole or in part, or which have been contracted for, shall hereafter be transferred, exchanged, sold, or otherwise disposed of in any manner whatsoever unless the Chief of Naval Operations in the case of naval material, and the Chief of Staff of the Army in the case of military material, shall first certify that such material is not essential to the defense of the United States." (Act of June 28, 1940, Sec. 14 (a).) "Thus to prohibit action by the constitutionally created Commander in Chief except upon authorization of a statutory officer subordinate in rank is of questionable constitutionality." Waiving this question, and in view of the legislative history of the act, "It is my opinion that in proceeding under Section 14 (a) appropriate staff officers may and should consider remaining useful life, strategic importance, obsolescence and all other factors affecting defense value, not only with respect to what the Government of the United States gives up in any exchange or transfer, but also with respect to what the Government receives. In this situation good business sense is good legal sense." (Opinion of Attorney General Jackson, Aug. 27, 1940.)

⁴ President Fillmore authorized an executive agreement with Great Britain for acquiring Horseshoe Reef near the outlet of Lake Erie, on condition that the United States would not fortify it and would erect a lighthouse on it. Congress had made a provisional appropriation for the lighthouse in 1849 and subsequently made an additional appropriation. (Miller, *Treaties, etc., of the United States*, Vol. 5, p. 905 ff.) President Theodore Roosevelt acquired a naval base at Guantanamo by executive agreement with Cuba in 1903, in pursuance of a general provision in the Platt Amendment of 1901 and the United States-Cuba

ent powers of the President in foreign affairs have been sustained by the Supreme Court.⁶ While there is no clear line between the subjects on which the President can enter into agreements under his constitutional powers to conduct foreign relations and those on which he must ask the advice and consent of the Senate, it appears that the prime consideration is whether the agreement imposes legal obligations upon the United States beyond the independent power of the President to fulfill. If the aid of Congress is necessary for fulfillment, the President should, before finally approving the instrument, either get the advice and consent of the Senate, thus making it a treaty in the constitutional sense, or he should get an authorizing act from Congress making appropriations or enacting legislation to fulfill such obligations.⁶ Since the present agreement imposed no such obligation requiring Congressional action, neither of these procedures was necessary.⁷

The Attorney General dealt with the Act of June 15, 1917,⁸ which was

Treaty of 1903. (Crandall, *Treaties, Their Making and Enforcement*, Washington, 1916, p. 139.) Texas and Hawaii were annexed by exchanges of notes in 1845 and 1898, transmitting acts of the respective legislative bodies. (Miller, *op. cit.*, Vol. 4, p. 689 ff.; Crandall, *op. cit.*, p. 135 ff.)

⁶ *United States v. Curtiss-Wright Export Corporation* (1936), 299 U. S. 304, this JOURNAL, Vol. 31 (1937), p. 334; *United States v. Belmont* (1937), 301 U. S. 324, this JOURNAL, Vol. 31 (1937), p. 537. See also *Watts v. United States* (Washington Territory, 288, 294), upholding an executive agreement for joint occupation by the United States and Great Britain of the Island of San Juan in Fuca Sound.

⁶ Q. Wright, *Control of American Foreign Relations*, pp. 235, 238, 346, 349.

⁷ The purpose of the agreement cannot, of course, be fulfilled unless Congress makes appropriations to develop the bases. There is, however, no international obligation to do so.

⁸ "Sec. 2. During a war in which the United States is a neutral nation, the President, or any person thereunto authorized by him, may detain any armed vessel owned wholly or in part by American citizens, or any vessel, domestic or foreign (other than one which has entered the ports of the United States as a public vessel), which is manifestly built for warlike purposes or has been converted or adapted from a private vessel to one suitable for warlike use, until the owner or master, or person having charge of such vessel, shall furnish proof satisfactory to the President, or to the person duly authorized by him, that the vessel will not be employed by the said owners or master, or person having charge thereof, to cruise against or commit or attempt to commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with which the United States is at peace, and that the said vessel will not be sold or delivered to any belligerent nation, or to an agent, officer, or citizen of such nation; by them or any of them, within the jurisdiction of the United States, or, having left that jurisdiction, upon the high seas.

"Sec. 3. During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation; or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States." (Act of June 15, 1917, 40 U. S. Stat. 221; U. S. Code, Tit. 18, Secs. 32, 33; Deák and Jessup, *Neutrality Laws, Regulations and Treaties*, Washington, 1939, Vol. 2, p. 1092.)

passed in order to fulfill the obligations of the United States as a neutral under the principles of the Alabama award and the Thirteenth Hague Convention of 1907, and which was alleged to prevent the dispatch of the over-age destroyers to Great Britain. He held that Sec. 3 applied only to vessels which had been "built, armed or equipped as a vessel of war, or converted from a private vessel into a vessel of war," with intent that the vessel should be delivered to a belligerent or employed in its service. As the destroyers were not built, armed, equipped or converted with the intent of trading them to Great Britain, he held that the Act did not apply.

The natural construction of this section of the Act of 1917 would read the "with any intent" clause as modifying not "built, armed or equipped as a vessel of war," but "to send out of the jurisdiction of the United States." There is a comma before the "with," and the final phrase "after its departure from the jurisdiction of the United States" would more naturally qualify an intent related to "sending out of the jurisdiction of the United States" than an intent related to "building, arming or equipping a vessel as a vessel of war" or "converting from a private vessel into a vessel of war." It cannot be said, however, that this natural construction is conclusive, and the Attorney General rejected it on the grounds that it would make the preceding section of the Act meaningless, and that it would go beyond the obligations of international law.

The preceding section of the Act of 1917 apparently authorizes the President to permit the departure from the United States of armed vessels for sale or delivery to a belligerent in *foreign territory* (not within the jurisdiction of the United States nor upon the high seas). It was argued that if Section 3 were given its natural interpretation, American citizens would be deprived of the opportunity to build war vessels in the United States for sale to a belligerent in foreign territory as a commercial transaction, an opportunity to which the Attorney General considered them entitled under international law, subject only to the risk of seizure as contraband by the opposing belligerent. "The difference between selling armed vessels to belligerents and building them to order" was supported by citations from Oppenheim's *International Law*:¹⁰

An armed ship, being contraband of war, is in no wise different from other kinds of contraband, provided that she is not manned in a neutral port, so that she can commit hostilities at once after having reached the open sea. A subject of a neutral who builds an armed ship, or arms a merchantman, not to the order of a belligerent, but intending to sell her to a belligerent, does not differ from a manufacturer of arms who

⁹ In this, the Attorney General accepted the opinion expressed in a letter to the New York Times, Aug. 11, 1940, by C. C. Burlingham, Thomas D. Thacher, George Rublee, and Dean Acheson.

¹⁰ Vol. 2, Sec. 334 (5th ed., p. 574 ff.), citing *La Santissima Trinidad*, 7 Wheaton 340 (1822), and *The Meteor* (1866), Balch, 201, 202. Oppenheim adds "though logically correct" the distinction is "hair-splitting" but "will probably continue to be drawn."

intends to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, and to deliver them to belligerents, either in a neutral port or in a belligerent port.

The Attorney General's construction of the statute is by no means convincing. Section 2 of the Act of 1917 would naturally be construed as intended to cover the case of a war vessel built or converted abroad and transiently in an American port. In this case the President's duty is limited to obtaining guaranties that such vessel shall not be used for war purposes until it has reached its foreign destination. Article 3, on the other hand, would naturally be construed to apply to the different case of a war vessel built or converted in the United States. The President in this case has the broader duty of preventing its departure altogether if there is any reason to believe it is destined to a belligerent or to be used in a belligerent's service.

This construction would conform the statute to the usual interpretation of the Rules of the Treaty of Washington, the *Alabama* award, the Hague Convention, and the requirements of the present law of neutrality. The Hague Convention (Article 8) requires a neutral government:

(1) To employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that government is at peace;

and

(2) To display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engaged in hostile operations which has been adapted entirely or partly within the said jurisdiction for use in war.¹¹

¹¹ The first rule of the Treaty of Washington was the same except that "to use due diligence" appears in place of "to employ the means at its disposal." The duty under the first sentence of this article was adequately met by Secs. 3 and 4 of the United States Act of 1794 which, with a few amendments, has been incorporated in Secs. 23 and 24 of the United States Code, Tit. 18. Earlier legislation had not provided for enforcing compliance with the duty accepted by the second sentence; consequently such decisions as the *Santissima Trinidad* and the *Meteor* were possible. (Q. Wright, *The Enforcement of International Law through Municipal Law in the United States*, Urbana, 1916, pp. 117-119; C. G. Fenwick, *The Neutrality Laws of the United States*, Washington, 1913, pp. 37, 48, 108.) Oppenheim paraphrased the second sentence in the Hague convention "the neutral is bound . . . to prevent the departure from his jurisdiction of any vessel which by order of either belligerent has been adapted to warlike use" (*op. cit.*, Vol. 2, Sec. 334), obviously changing its meaning. While there was at first doubt whether the rules of the Treaty of Washington could be regarded as declaratory of customary international law (see Moore's *Digest of International Law*, Vol. 7, pp. 1064 ff., 1068 ff.), and while some writers, like Oppenheim, following W. Beach Lawrence and Wharton (*Criminal Law*, 8th ed., Philadelphia, 1880, Vol. 2, p. 626 ff.), have attempted to read the old distinction between commercial and belligerent intent into them, the overwhelming opinion and practice have ignored this distinction in the case of warships and have considered that a warship, built or outfitted in neutral territory, and proceeding on its own keel, is not merely contraband (its inclusion in that category in the Declaration of London (Art. 22) was to assure the belligerents' right of capture in case the neutral failed in its duty), but cannot be allowed to leave neutral territory for belligerent use. (See Harvard

The natural interpretation of Article 3 of the Act of 1917 conforms to the second requirement, while the Attorney General's construction does not. Furthermore, there is nothing in Article 8 of the Hague Convention which requires a neutral to detain a ship built abroad for war purposes and transiently within its jurisdiction. The neutral is, however, bound to prevent its territory being made use of as a base of naval operations under Article 5 of the Hague Convention, and Section 2 of the Act of 1917, with its natural construction, would seem to meet this obligation.¹²

But whether or not the Attorney General's construction of the Act of 1917 is correct, that Act seems irrelevant to the case in hand. The destroyers were sent out of the United States by the United States Government itself. The Act of 1917 is a criminal statute presumably dealing with acts of individuals, not of the government. In spite of the general terms used in Section 3 ("it shall be unlawful to send out") it cannot have been intended to interfere with the President's disposition of vessels of the Navy. That subject is dealt with in other statutes.¹³ Furthermore, the Act applies only "during a war in which the United States is a neutral nation." It may be doubted whether the United States has that status in relation to the hostilities against Germany. It should be added, however, that since presidential proclamations have invoked the general neutrality legislation of the United States as a matter of municipal law, private persons would be well advised to be guided by that legislation unless further proclamation is made. The destroyer transfer, however, was not a transaction by private persons, the Act of 1917 was not applicable, and the President had ample authority to effect the transaction by the procedure adopted under the law of the United States.

Research Draft Convention on Neutrality, Art. 7, this JOURNAL, Supp., Vol. 33 (1939), pp. 249, 254; G. A. Finch (unsigned), this JOURNAL, Vol. 9 (1915), p. 177; C. C. Hyde, *International Law*, 1922, Vol. 2, pp. 710, 762.) During the Spanish American War, Great Britain refused to allow the departure until the war was over of two war vessels under construction in British shipyards for Brazil, but purchased by the United States from Brazil before the war began. (Moore's Digest, Vol. 7, p. 861; Benton, *International Law and Diplomacy of the Spanish American War*, Baltimore, 1908, p. 182.) The North German Lloyd and the Hamburg American Line sold to Russia during the Russo-Japanese War, four of their merchant vessels designed to be converted into war vessels in time of war. Germany made no effort to prevent the transaction and apparently Japan did not protest. (Moore's Digest, Vol. 7, p. 863; Oppenheim, *op. cit.*, Vol. 2, Sec. 321.) During the World War it was contended that neutrals must prevent the sale even of merchant vessels to belligerents from their territory. (Hyde, *op. cit.*, Vol. 2, p. 762 ff.) While this is not an established rule of law, unless the merchant vessel is in condition to be immediately converted at sea, it is believed that the rules of the Hague Convention are. Consequently the fact that at least one state engaged in the present hostilities (Poland) is not a party to this convention is unimportant. If the situation were one of war and neutrality, and the facts were pertinent, the rules quoted would be applicable.

¹² The commentary to the Harvard Research Draft Convention on Neutrality cites "operating against enemy craft from neutral refuges" as among acts constituting neutral territory a "base of operations." (*Loc. cit.*, p. 338.)

¹³ *Supra*, note 3.

With respect to international law, the duties of the United States depend upon its status *vis-à-vis* the European hostilities. If it were a neutral, the transfer of the destroyers to Great Britain would be difficult to justify, but not on the ground that it violated the principle of the *Alabama* award and Articles 5 and 8 of the Hague Convention. These provisions deal with a neutral government's duty to prevent certain acts by private persons within its jurisdiction. (Critics should rather refer to Article 6 of the Hague Convention which deals with the neutral government's duty itself to abstain from certain acts: "The supply in any manner, directly or indirectly, by a neutral Power to a belligerent Power of warships, ammunition or war material of any kind whatever is forbidden." This rule is so well established that reference seems superfluous.) The Harvard Draft on Neutrality states the rule: "A neutral state shall abstain from supplying to a belligerent assistance for the prosecution of the war" (Article 5). It is true certain cases of indirect aid are referred to in the commentary as exceptions: for instance, the use of neutral ports for twenty-four hour sojourn or for asylum by belligerent warships, the use of neutral pilots by belligerent warships, and the use of neutral postal facilities, but none of these cover the case of the destroyers.¹⁴ (On October 15, 1914, a United States Department of State circular said: "For the Government of the United States itself to sell to a belligerent nation would be an unneutral act."¹⁵ The fact that the transfer of the destroyers was made for valuable political considerations would not affect the application of this rule. If anything, it would make the breach of neutrality more serious.) *Quincy* (M)

(In the writer's opinion, however, the United States is not a neutral in relation to the European hostilities. It has, instead, the status of "a supporting state," to use the terminology of the Harvard Draft on Rights and Duties of States in Case of Aggression. A supporting state is defined as one "which assists a defending state without armed force."¹⁶) ✓

(By becoming a supporting state, a state acquires the right to discriminate against the aggressor, but it may not do any act to the detriment of states other than the aggressor unless such act would be lawful if done by a defending or co-defending state. Against an aggressor, a supporting state has the rights which, if it were neutral, it would have against a belligerent.)

¹⁴ This JOURNAL, Supp., Vol. 33 (1939), p. 235.

¹⁵ *Ibid.*, p. 238. See Deák and Jessup, *Neutrality Laws, etc.*, Vol. 2, p. 1256; Moore's Digest, Vol. 7, p. 863 ff.; Hyde, *op. cit.*, Vol. 2, p. 698; Oppenheim, *op. cit.*, Vol. 2, Sec. 321; L. H. Woolsey, "Government Traffic in Contraband," this JOURNAL, Vol. 34 (July, 1940), p. 498 ff.

¹⁶ Arts. 1 (g), 10, this JOURNAL, Supp., Vol. 33 (1939), pp. 879, 902. Acts of Brazil, Costa Rica, El Salvador, Guatemala, Peru, and Uruguay, after American entry into the World War in 1917, and acts of most of the members of the League of Nations in applying sanctions against Italy in 1935, are cited as indications of this status. Other terms used with a similar meaning have been "non-belligerent," "benevolent neutral," "partial." (Q. Wright, *Proc. Am. Soc. Int. Law*, 1930, p. 80.)

It is true the Harvard Draft is in the form of a proposal for a treaty rather than in the form of a statement of existing international law. In the writer's opinion, however, it does state substantially existing international law binding parties to the Pact of Paris. This view was taken by the International Law Association in the Budapest Articles of Interpretation which declared among other things:

Whereas the Pact is a multilateral lawmaking treaty whereby each of the high contracting parties makes binding agreements with each other and all of the other high contracting parties, and

Whereas by their participation in the Pact sixty-three states have abolished the conception of war as a legitimate means of exercising pressure on another state in the pursuit of national policy and have also renounced any recourse to armed force for the solution of international disputes or conflicts:

(1) A signatory state cannot, by denunciation or nonobservance of the Pact, release itself from its obligations thereunder.

(2) A signatory state which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact.

(3) A signatory state which aids a violating state thereby itself violates the Pact.

(4) In the event of a violation of the Pact by a resort to armed force or war by one signatory state against another, the other states may, without thereby committing a breach of the Pact or of any rule of international law, do all or any of the following things:

(a) Refuse to admit the exercise by the state violating the Pact of belligerent rights, such as visit and search, or blockade, etc.;

(b) Decline to observe toward the state violating the Pact the duties prescribed by international law, apart from the Pact, for a neutral in relation to a belligerent;

(c) Supply the state attacked with financial or material assistance including munitions of war;

(d) Assist with armed forces the state attacked.¹⁷

These articles were in general regarded by the British Government as the proper construction of the Pact,¹⁸ and they conform to Secretary of State Stimson's construction of the Pact in 1932.¹⁹

This interpretation holds that a state which has initiated hostilities in violation of its obligations under the Pact of Paris is not a lawful belligerent and that third states are under no obligation to observe toward it the duties

¹⁷ International Law Association, Report of 38th Conference, Budapest, 1934, p. 4; this JOURNAL, Supp., Vol. 33 (1939), p. 825.

¹⁸ House of Lords Debate, Feb. 20, 1935, quoted, International Law Association, *loc. cit.*, p. 310 ff., especially statements of Lord Howard of Penrith, who, as ambassador in Washington, assisted in the negotiation of the treaty (p. 320 ff.), and Lord Chancellor Sankey, speaking for the Government (p. 340 ff.).

¹⁹ Foreign Affairs, Supp., October, 1932.

of neutrals.²⁰ (This distinction is thus stated in the introductory comment upon the Harvard Draft on Aggression?)

This Draft Convention on rights and duties of states in case of aggression is based upon the assumption that a distinction in law is to be drawn between war on the one hand and, on the other hand, certain forceful acts determined to constitute a violation of a particular type of legal obligation. In the case of war which is dealt with in the Convention on Rights and Duties of Neutral States, the legality, illegality or extra-legality of the action of the state in commencing the war is not a matter of concern. However, where the resort to armed force is in violation of a specific legal obligation not to resort to such measures, it is possible to speak in terms of the illegality of the state's action. The illegal use of armed force may amount to "war" in the material sense of the term, but under this Draft Convention, which does not deal in terms of the traditional rights of belligerents and neutrals, war in the technical legal sense never results.²¹

(This position was accepted by the United States and other governments in the cases of the Japanese invasions of China, and the Russian invasion of Finland. It was also accepted by members of the League of Nations in the Italian invasion of Ethiopia. These cases were not regarded as involving formal duties of neutrality.²²)

Germany and Italy are parties to the Pact of Paris, as are all the countries they have invaded, and the United States. (The invasion of Poland by Germany was regarded by the British and French Governments as an act of aggression requiring them to give the assistance they had pledged to Poland in that event. The British Dominions, except Ireland, soon accepted this position. While other states, including the United States, proclaimed neutrality, this has not precluded them from subsequently recognizing the situation as one of aggression. The successive victims of Germany's aggressions have done so, as have the American states.²³)

²⁰ See Q. Wright, "Neutrality and Neutral Rights following the Pact of Paris," *Proc. Am. Soc. Int. Law*, 1930, p. 79 ff.; "The Meaning of the Pact of Paris," *this JOURNAL*, Vol. 27 (1933), p. 59; "The Present Status of Neutrality," *ibid.*, Vol. 34 (July, 1940), p. 401 ff.

²¹ *This JOURNAL*, Supp., Vol. 33 (1939), p. 823.

²² See Q. Wright, "The Present Status of Neutrality," *loc. cit.*, p. 404 ff.

²³ "The text of the joint declaration by the American Republics with regard to the invasion of Belgium, Holland, and Luxemburg proposed by the Uruguayan Government and agreed to by the other American Republics was released, May 19, 1940, by the President of Panama and reads as follows:

"The American Republics in accord with the principles of international law and in application of the resolutions adopted in their inter-American conferences, consider unjustifiable the ruthless violation by Germany of the neutrality and sovereignty of Belgium, Holland and Luxemburg.

"In paragraphs four and five of the Ninth Resolution of the Meeting of Foreign Ministers held at Panama in 1939, entitled 'Maintenance of International Activities in accordance with Christian Morality,' it was established that the violation of the neutrality or the invasion of weaker nations as a measure in the conduct and success of war, warrants the American

(It is believed that the various public declarations by the President and Secretary of State that Germany and Italy are aggressors,²⁴ that international law and the Pact of Paris have been violated,²⁵ that acts of the violating states professing to change the status of occupied territories will not be recognized,²⁶ and that forms of aid incompatible with a status of neutrality will be extended to the victims of aggression,²⁷ are adequate to indicate that the United States is no longer a neutral from the point of view of international law.)

There has, it is true, been no repeal of the President's proclamations of September 5, 1939, and subsequently, which recognized a "state of war"

Republics in protesting against this infraction of international law and the requirements of justice.

"The American Republics therefore resolve to protest against the military attacks directed against Belgium, Holland and Luxemburg, at the same time making an appeal for the re-establishment of law and justice in the relations between countries." (Department of State Bulletin, May 25, 1940, Vol. II, p. 568.)

²⁴ "Force and military aggression are once more on the march against small nations, in this instance through the invasion of Denmark and Norway. . . . The Government of the United States has on the occasion of recent invasions strongly expressed its disapprobation of such unlawful exercise of force. It here reiterates, with undiminished emphasis, its point of view as expressed on those occasions." (Statement of the President, April 13, 1940, Dept. of State Bulletin, Apr. 13, 1940, Vol. II, p. 373.) "The cruel invasion by force of arms of the independent nations of Belgium, Netherlands, and Luxemburg has shocked and angered the people of the United States and, I feel sure, their neighbors in the Western Hemisphere. The people of the United States hope, as do I, that policies which seek to dominate peaceful and independent peoples through force and military aggression may be arrested." (Letter of the President to the King of Belgium, May 11, 1940, *ibid.*, May 11, 1940, Vol. II, p. 493. See also the President's Charlottesville address, June 10, 1940, *ibid.*, June 15, 1940, Vol. II, p. 637, and Secretary of State Hull's address to the American Society of International Law, May 13, 1940, *ibid.*, May 18, 1940, Vol. II, p. 532.)

²⁵ Joint Declaration of American Republics, *supra*, note 23. See also address by Secretary of State Hull on anniversary of signature of Pact of Paris, Aug. 28, 1940.

²⁶ See statements on non-recognition of conquest of Poland (*ibid.*, Oct. 7, 1939, Vol. I, p. 342; Nov. 4, 1939, Vol. I, p. 458); on non-recognition of changes in Western Hemisphere (*ibid.*, June 22, 1940, Vol. II, p. 681); Habana Declaration and Convention (*ibid.*, Aug. 24, 1940, Vol. III, pp. 138, 145); and on non-recognition of conquest of France (*ibid.*, June 15, 1940, p. 639).

²⁷ "Making every possible effort under present conditions, the Government of the United States has made it possible for the Allied armies to obtain during the weeks that have just passed airplanes, artillery and munitions of many kinds and this Government so long as the Allied governments continue to resist will redouble its efforts in this direction. I believe it is possible to say that every week that goes by will see additional matériel on its way to the Allied nations. . . . So long as the French people continue in defense of their liberty which constitutes the cause of popular institutions throughout the world, so long will they rest assured that matériel and supplies will be sent to them from the United States in ever-increasing quantities and kinds. I know that you will understand that these statements carry with them no implication of military commitments. Only the Congress can make such commitments." (President's letter to French Premier Reynaud, June 15, 1940, *ibid.*, Vol. II, p. 639.)

and invoked the general neutrality laws of the United States, nor of those of November 4, 1939, and subsequently, which "proclaimed" that a state of war unhappily exists" and invoked the act of November 4, 1939. These proclamations, however, and the acts to which they refer, are measures of municipal law. Their invocation and application are not conclusive as to the status under international law which the United States now has in relation to the European hostilities. Even though the United States regards the European hostilities as a situation of aggression and its own position as, not that of a neutral, but that of a "non-belligerent" or a "supporting state," it might still wish to apply its domestic "neutrality" regulations, and there is nothing in international law to prevent it from doing so. On the other hand, there is nothing in international law to prevent it from modifying these regulations as it sees fit.²⁸

(It is believed that the United States has a complete answer to any challenge to the propriety of the destroyer transaction under international law. The states of the world have generally recognized that Germany has initiated hostilities in violation of its international obligations under the Pact of Paris and other instruments.²⁹ Consequently Germany is not a lawful belligerent, and parties to these instruments are not obliged under international law to observe toward Germany and her allies the duties of a neutral.³⁰)

Then, perhaps there cannot be any legal, under Int. law. QUINCY WRIGHT

²⁸ The situation has some analogy to that of insurgency in which states have exercised a certain discretion in applying neutrality regulations. (Moore's Digest, Vol. 7, p. 1077 ff.; G. G. Wilson, Naval War College, International Law Situations, 1904, pp. 41-51; N. J. Padelford, "International Law and the Spanish Civil War," this JOURNAL, Vol. 31 (1937), p. 230 ff.)

²⁹ These include Germany's non-aggression agreements with Poland, Jan. 26, 1934, Belgium, Oct. 13, 1937, and Denmark, May 31, 1939.

³⁰ The Harvard Research draft does not permit a state to be treated as an aggressor until its resort to armed force "has been duly determined by a means which that state is bound to accept, to constitute a violation of an obligation." (Art. 1 (c), this JOURNAL, Supp., Vol. 33 (1939), pp. 847, 871.) It appears, however, that general recognition constitutes such a method under customary international law. (Q. Wright, "Present Status of Neutrality," this JOURNAL, Vol. 34 (July, 1940), p. 403.) It is believed that at least 35 parties to the Pact of Paris and four other states have recognized Germany as an aggressor in recent hostilities. These include Great Britain, France, Canada, Australia, New Zealand, South Africa, India, Egypt, Poland, Denmark, Norway, Iceland, Belgium, Netherlands, Luxembourg, Ethiopia, Czechoslovakia, Portugal and the 21 American Republics (*supra*, note 23), four of which, however (Argentina, Bolivia, El Salvador, and Uruguay), are not parties to the Pact. Of the remaining 28 parties to the Pact, four are, or recently have been, engaged in aggressions (Germany, Italy, Japan, Russia); ten, as present or recent victims of aggression (Austria, Albania, Spain, Danzig, China, Finland, Latvia, Lithuania, Estonia, Rumania), and seven as small states in close proximity to the aggressors (Bulgaria, Greece, Hungary, Sweden, Switzerland, Turkey, Yugoslavia), are not in a position to take any independent action. The position of the seven remaining parties to the Pact (Afghanistan, Iran, Iraq, Ireland, Liberia, Saudi Arabia, Siam) is not clear.

THE ATTORNEY GENERAL'S OPINION ON THE EXCHANGE OF DESTROYERS FOR NAVAL BASES

The Attorney General's opinion of August 27, 1940,¹ on the exchange of destroyers for naval bases is a veritable *tour de force*. The arrangement was concluded by executive agreement. As Professor Briggs points out in his article in this issue,² the transaction was sustained under statutes which hardly bear the construction placed upon them. It is significant that the Attorney General limited his research and opinion to "the questions of constitutional and statutory authority, with which alone I am concerned." He thus, evidently intentionally, omitted all reference to international law, without which the opinion could hardly be complete. So far as the record shows, no one expressed an opinion on the question whether the transaction was privileged under international law, although Mr. James W. Ryan³ thinks that it was. The Attorney General postulates his conclusion, however, on the assumption that the transaction is justified under the rules of neutrality. Others appear to conclude⁴ that because Germany is an "aggressor," the United States under League of Nations theories and the Kellogg Pact is not obliged to maintain neutrality, and therefore may presumably exert sanctions. Inasmuch as international law does have something to say about this matter, it is well to inquire what it tells us and what the country's legal status now is. Without attempting here to pass on the question of policy, we may assume that the transaction itself meets with popular approval. Yet because it is so portentous in its facts and implications, it may be suggested that the transaction be regularized so far as and as soon as possible by act or resolution of Congress.

Without going over the ground so convincingly covered by Professor Briggs, there are certain matters in the Attorney General's opinion which deserve examination.

(1) The Attorney General starts from the assumption that the assumed plenary powers of the President to deal with foreign affairs, his powers as Commander in Chief to safeguard the national defense, and his statutory power through the Secretary of the Navy to dispose of "naval vessels" which have been "found unfit for further use and stricken from the naval registry" justify the executive agreement. In support of the supposedly plenary power in foreign affairs, a dictum of Justice Sutherland in the case of *United States v. Curtiss-Wright Export Corporation*⁵ is relied upon. The Curtiss-Wright case involved a criminal prosecution for the violation of an arms embargo in the Chaco War. The embargo was imposed by the President under a Joint Resolution of Congress of May 28, 1934, which specifically

¹ Dept. of State Bulletin, Sept. 7, 1940, p. 201; also herein, *infra*, p. 728.

² *Supra*, p. 569.

³ Appendix to Congressional Record, Sept. 11, 1940, pp. 18, 110.

⁴ Quincy Wright in this issue of the JOURNAL, p. 680 at p. 685.

⁵ 299 U. S. 304 (1936); this JOURNAL, Vol. 31 (1937), p. 334.

authorized the President to impose the arms embargo if he finds that it "may contribute to the re-establishment of peace" between the belligerents. The defendants contended that this delegation of power to make a determination that the embargo may "contribute to the re-establishment of peace" was not adequately controlled by criteria. Judge Byers in the District Court agreed with that view, but the Supreme Court reversed on the ground that in the matter of "*negotiation and inquiry*" Congressional legislation "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." This does not give the President *carte blanche* to do anything he pleases in foreign affairs, for it is limited to "*negotiation and inquiry*." Certainly the President is the "sole organ of the nation in its external relations and its sole representative with foreign nations," as Marshall said in 1800. This speaks merely of agency, but not of power to *conclude and bind* the nation in fundamental matters. He necessarily must make all kinds of provisional agreements and *modi vivendi*, but it has been the usual practice, aside from executive agreements on minor matters or under Congressional authority, to submit important matters to Congress or the Senate for approval.⁶ When Justice Sutherland speaks of the "very delicate plenary and exclusive power of the President," he adds that it "must be exercised in subordination to the applicable provisions of the Constitution." But apart from these provisions, there are constitutional understandings which require that agreements of great importance, particularly involving the question of war and peace, shall not be concluded by Executive authority alone. The somewhat loose dicta of Justice Sutherland ought not to be permitted to break down constitutional safeguards. As in the case of the Rush-Bagot Agreement of 1817 limiting armaments on the Great Lakes, it would have been and is now perfectly possible to submit the arrangement to Congress for its approval, and this indeed would be a protection to the Executive against future recriminations and trouble. Indeed, it is doubtful how far future governments of Great Britain would consider themselves bound by the executory character of the options given to the United States by the agreement, and even though the United States' obligation may be executed by the delivery of the destroyers, future American administrations may take a different attitude toward the agreement. Naval bases in the territory of another country carry far-reaching implications.

Some of the supposed precedents cited by the Attorney General are not in point, such as executive agreements concluded under authority of a Congressional statute. (Congress did not authorize the present transaction.) For example, the agreements of February 16 and July 2, 1903, for the lease

⁶ John Bassett Moore, "Treaties and Executive Agreements," 20 Political Science Quarterly 385 (1905); James F. Barnett, "International Agreements without the Advice and Consent of the Senate," 15 Yale L. Jour. 18, 63 (1905). W. H. Simpson, "Legal Aspects of the Executive Agreements," 24 Iowa L. Rev. 67 (1938).

of naval and coaling stations in Cuba were concluded under the Platt Amendment of the Act of March 2, 1901, providing for such bases "at certain specified points to be agreed upon with the President of the United States." So with the reciprocal trade agreements. Horseshoe Reef was not acquired from a belligerent government, and, as the Attorney General points out, its acquisition was submitted to Congress for the appropriation of the necessary funds to build the lighthouse. Louisiana was purchased not in time of war but in time of peace, some time before the Treaty of Amiens was broken by the renewed outbreak of the war in 1803.⁷ A real precedent might have been cited in the Lansing-Ishii Agreement of 1918. But this agreement exemplifies the temptations and dangers involved in political executive agreements because it included a secret clause⁸ which, while relatively unimportant, was not disclosed until the agreement was abrogated by the Washington Treaties of 1923. The treaty-making power could easily be circumvented if it were to become customary to make important matters affecting the fate of the country the subject of executive agreements.

(2) The Attorney General invokes a statute of 1883 which authorized the Secretary of the Navy to dispose of vessels unfit for further use and stricken from the naval register after an appraisal and an offer to sell to the highest bidder above the appraised value "unless the President of the United States shall otherwise direct in writing." In the case of *Levinson v. United States*,⁹ in connection with the disposal of an unneeded yacht, the President availed himself of this power to authorize the acceptance of a bid lower than the highest and dispensed with advertising and other unimportant details. That deal the Supreme Court under the circumstances approved. To use this statute and this case as a support for the disposal by executive agreement of fifty over-age destroyers whose usefulness had been attested by naval officers appearing before the Senate Committee on Naval Affairs, seems a little unusual. It had never heretofore been supposed that the President as Commander in Chief of the Army and Navy could transfer a part of the Navy to a foreign Power. If this can be done, a dangerous power is vested in the President for, according to the Attorney General, there is no limitation as to the transferee, individual, corporate or government, belligerent or neutral, nor any limitation on the consideration which may be obtained.

✓ Congress, however, fearing an Executive transfer of certain naval vessels to Great Britain, enacted a statute on June 28, 1940, seeking to limit such disposition by requiring a certificate from the Chief of Naval Operations in the case of naval material "that such material is not essential to the defense of the United States." The Attorney General doubts the constitutionality

⁷ On April 30, 1803, the two conventions were signed; on May 15, 1803, Great Britain declared war on France. Bemis, *Diplomatic History of the United States*, New York, 1936, pp. 135-136.

⁸ For. Rel., 1922, II, 595; Lansing Papers (Washington, 1940) II, 450; Griswold, *Far Eastern Policy of the United States* (1938), 216.

⁹ 258 U. S. 198 (1922).

of this limitation but pretermits the question by a construction which, to say the least, is novel.¹⁰ The Attorney General concludes that the naval bases would, as compared with the destroyers, add so much to the defensive position of the United States that the Chief of Naval Operations not only may but "should certify under Section 14 (a) that the destroyers involved are not essential to the defense of the United States, if in his judgment the exchange of such destroyers for such naval and air bases will strengthen rather than impair the total defense of the United States." Admiral Stark in presenting his certificate invokes in each paragraph this construction of the Attorney General, throwing upon him the responsibility for the certificate that he rendered.¹¹ It is fair to assume that the draftsmen of Section 14 (a) hardly contemplated such a construction of the section.

But another difficulty presents itself. In justifying an executive agreement instead of a treaty to cover the transaction, the Attorney General emphasizes the fact that the President was not incurring future obligations by acquiring naval bases but was taking only an option or privilege of which the United States might or might not take advantage. He says: "The acquisitions which you are proposing to accept are without express or implied promises on the part of the United States to be performed in the future."

If such promises had been implied and the Congress committed, the inference is that a treaty would be necessary, as in the treaty of 1903 with Cuba. Yet unless such promises are implied, or, at least, unless the naval bases are actually acquired, the transfer of the destroyers could hardly be deemed to strengthen "the total defense of the United States."

(3) It has been observed that the Attorney General confines himself to constitutional power and statutes and omits the questions of international law involved. His opinion can therefore be considered as a partial opinion only, for the legality of the issue involves all aspects of the law and not merely some. In construing Sections 2 and 3 of the Act of June 15, 1917, the Attorney General falls into the error which Professor Briggs has pointed out. Section 3, as reproduced by the Attorney General, provides:

During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel [,] built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation or . . . that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States. (Brackets supplied.)

Apart from the fact that the original Statutes at Large¹² print *no* comma between the word "vessel" and the word "built" and thus leave the meaning

¹⁰ Professor Briggs has presented the background of the statute.

¹¹ Professor Briggs gives the text of the certificate, *supra*, p. 574, note 21.

¹² 40 Stat. 217, 222.

free from ambiguity, the history of this statute clearly shows that the words "with any intent" relate back to the words "it shall be unlawful to *send*" any vessel out of the jurisdiction of the United States with intent that it shall be used in belligerent service. The Attorney General, however, reaches his conclusion that the destroyers may be sent to Great Britain by construing the statute as if the words "with any intent" relate back to the words "built, armed or equipped as a vessel of war . . . with any intent" that such vessel shall be used in belligerent service. He concludes that the destroyers were not *built*, armed or equipped with that intent, but with the intent that they should be used by the United States Navy. Hence he approves the transaction. He fortifies his conclusion by the statement that unless Section 3 is construed as he misconstrues it, Section 2, which provides for the detention in port of any armed vessel owned by American citizens, manifestly built or converted for warlike purposes, until the owner shall prove that it will not be employed in the service of a belligerent, is meaningless. As Professor Briggs points out, Section 2 has applications quite different from those of Section 3, and Section 3 has a history in the Rules of Washington which fully explain it. The second clause of Rule 1 makes it the duty of the neutral "to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war . . . such vessel having been specially adapted in whole or in part within such jurisdiction to warlike use." Attorney General Gregory in 1917 felt it important to incorporate this obligation of international law into our municipal statutes. He called it "despatching," as do the British. The first clause prohibits "fitting out or arming or equipping," each a complete offense.

Mr. Ryan would escape the inhibitions of Section 3 by maintaining that it does not apply to the United States, but only to individuals. But the section is a response to an obligation resting upon the United States not only itself to refrain from supplying warships, but to prevent its citizens from so doing.¹³ Article 6 of Hague Convention XIII provides: "The supply in any manner directly or indirectly by a neutral Power to a belligerent Power of warships, ammunition or war material of any kind whatever is forbidden";¹⁴ and if it is answered, as Mr. Ryan does, that the Hague Convention *qua* convention is not binding because Great Britain did not subscribe to it—because the convention as a whole did not go far enough—it may be answered that Article 6 presents a rule of law which has been generally accepted law since 1793 and has not been dissented from by any country.¹⁵

¹³ John Bassett Moore has well said: "It is a self-evident proposition that if a government may by legislation fix the measure of what it owes to other states, there is no such thing as international law or international obligation." Moore's Arbitrations, I, 377.

¹⁴ On the whole subject, cf. Art. 5 of Harvard Research in International Law, Professor Jessup, Reporter, this JOURNAL, Supplement, Vol. 33 (1939), pp. 235-245.

¹⁵ The circular of the Dept. of State, Oct. 15, 1914, reads: "For the Government of the United States itself to sell to a belligerent nation would be an unneutral act . . ." Deak and Jessup, Collection of Neutrality Laws (1939), p. 1256. See documents printed in Moore's

To justify his opinion that only ships "built, armed or equipped" for a belligerent may not be sent out of the United States, the Attorney General invokes the authority of the English writer, Oppenheim, who does contend that a private merchant may deal in warships. But Oppenheim stands practically alone in that opinion, which is not supported by his own government.¹⁶ Oppenheim also gratuitously interpolates the words "by order of a belligerent," a qualification which is not to be found either in the Rules of Washington or in Article 8 of Hague Convention XIII,¹⁷ or in the British Foreign Enlistment Act of 1870, which punishes any person who "despatches or causes or allows to be despatched, any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state." When the United States Government through Admiral, then Lieutenant, Sims, sought to recover the deposit money on two vessels purchased in England just before the outbreak of the war with Spain, but not delivered by the sellers because of the war, the Queen's Bench Division¹⁸ decided that the delivery of the ships contracted for had become illegal after the outbreak of the war. Rivier has stated that it is a universal rule.¹⁹ While it is true that in the early part of the century private trade in warships, though rare, was not prohibited, and Story in a dictum in the *Santissima Trinidad*²⁰ so affirmed, Mr. J. C. Bancroft Davis for the United States repudiated Story's view in the Alabama arbitration.²¹

It is unfortunate that the Attorney General's research became diverted to the obligation of private individuals with respect to trading in warships, for the case submitted involved a trade by the United States Government. International law could therefore hardly be avoided, if the rules of law

Digest, VII, 863-868; Woodrow Wilson (Jan. 1915) opposed the sale of government-owned *Krag* rifles "to any one during the progress of the present war," and felt "it is really our duty (in the spirit, at any rate, of the *Alabama* decision) to prevent submarines being shipped from this country, even in parts." R. S. Baker, Woodrow Wilson, V, 190-191.

¹⁶ In 1914, it was said by the British Embassy at Washington that "the Rules (of Washington) may be said to have acquired the force of generally recognized rules of international law." American White Book, 1914, II, 37, quoted in Hyde, International Law, II, 713.

¹⁷ For the background of this article, see Research in International Law, *supra*, n. 14, pp. 249-256.

¹⁸ *United States v. Pelly*, 4 Commercial Cases 100.

¹⁹ "No State would dream of contesting the principle they (the Rules of Washington) contain." Moore's Arb., I, 674.

²⁰ 7 Wheat. 283; Moore's Arb., I, 575.

²¹ "If that eminent jurist had said that a vessel of war was to be regarded in public law as an article which might be legitimately constructed, fitted out, armed, equipped, or dealt in by a person in the territory of a neutral, with the intent that it should enter the service of a belligerent, subject only to a liability to capture as contraband of war by the other belligerent, the United States would have been forced, with great regret, to ask this tribunal to disregard an opinion so at variance with common sense, and with the whole current of the action of nations." Moore's Dig., VII, 895.

constituted the object of investigation. A more appropriate quotation from Oppenheim, Section 321, would have been the following:

If a State remains neutral it violates its impartiality by furnishing a belligerent with troops or men of war; and it matters not whether it renders such assistance to one of the belligerents or to both alike.²²

As Professor Hyde says, "In fitting out, arming and removal from neutral territory of a vessel which becomes attached to the service of a belligerent and engages in hostilities in its behalf, this principle (the territorial source of the aid) finds simple application and wide recognition. Such conduct constitutes participation in the conflict, a result which is due to the removal of an instrument of war from neutral territory."²³

There was therefore no sound basis for distinguishing the "mosquito" boats from the destroyers on the ground that the former required completion in American shipyards. Both types were in the same legal category—public vessels of the United States—and subject to the same rules of law.

Finally, it has been suggested,²⁴ that in view of the fact that Germany is an "aggressor", the rules of neutrality have no application and that Germany has exposed herself to the discriminatory treatment contemplated in the privately proposed Draft Convention on Rights and Duties of States in Case of Aggression.²⁵ That draft "does not deal in terms of the traditional rights of belligerents and neutrals," for, under its hypotheses, "war in the technical legal sense never results" when an aggressor resorts to armed force "in violation of a specific legal obligation not to resort to such measures." This provision of two rules of law, one for lawful war and one for aggression, one rule for one belligerent and one for another, seems, with entire respect, like a prescription for more or less perpetual war and a counsel of anarchy. By what right are nations permitted to pass judgment upon each other's political morals and take discriminatory action accordingly? Needless to say, unanimity on such issues is impossible of achievement, and while a theoretical argument might be made for an objective tribunal of all the nations reaching a unanimous decision on the point, nothing can be said for individual national judgments made, as such judgments are necessarily made, not on objective criteria but as the result of self-interest, prejudice, prior commitments, and alliances. The "draft convention" on "aggression" is an evangelical expression of moral convictions which will not bear the brunt of practical application and, for this uneasy world, is non-legal in its connotations.

²² Oppenheim sustains the sale of Hamburg American and North German Lloyd unarmed merchant vessels to Russia in the Russo-Japanese War because he considers them not to be auxiliary naval vessels. Were they to be so considered, their sale would be and has been subject to serious criticism, as Professor Briggs points out.

²³ Vol. II, p. 711.

²⁴ This JOURNAL, *supra*, p. 685.

²⁵ Harvard Research in International Law, this JOURNAL, Supplement, Vol. 33 (1939), p. 821.

To the writer there is no possibility of reconciling the destroyer deal with neutrality, with United States statutes, or with international law. It can only be explained by the legal fact that the United States is now, and it is submitted, has been for some time, in a state of limited war, analogous to but not identical with that which prevailed between the United States and France in the period between May, 1798, and May, 1800, when the ships of the United States, under authority of an Act of Congress, made attacks upon and captured French vessels which had been spoliating American commerce.²⁶ The concept of "non-belligerency" like that of "measures short of war" has no legal status. It is apparently designed to justify breaches of neutrality or acts of war, perhaps with the hope that they will not result in a state of war. With full deference, it is not easy to justify that part of the President's message informing Congress of the destroyer-bases exchange²⁷ reading: "This is not inconsistent in any sense with our state of peace." It will be interesting to see whether "measures short of war" can long avert a state of war. But it would have been a more grateful task for the Attorney General had he not sought to reconcile the transaction with a state of peace and neutrality.

EDWIN BORCHARD

NEUTRALITY ON THE DEFENSIVE

(Doubtless one of the saddest commentaries upon the present low state of international law is the fact that efforts must still be made by international lawyers to rationalize the position of the United States in being at once "neutral" in its general policy towards the belligerents, and unneutral in specific details of its practical conduct. The situation is indeed paradoxical. The Neutrality Proclamation of September 3, 1939, is still in force; we are still on terms of friendship and amity with the belligerent Powers; we are still pretending that our conduct must be made to appear in conformity with international law, even if it is not actually so. At the same time, both of our major political parties have openly taken sides in favor of one of the belligerents; Congress has appropriated some ten billion dollars or more to defend the country against the situation that would be created if the other belligerent should be victorious; and the Administration has made a deal with the first belligerent by which we give open aid to it in return for naval bases whose defensive purpose can only be directed against the second belligerent. Obviously it is all anything but "neutrality"; and yet we are at a loss to find a legal category in which it may be correctly fitted.)

(The explanation is simple enough. It is politics that prevents us from facing the situation frankly and from formulating a sound legal justification for our inconsistent conduct.) So long have the people of the United States been led to believe that there could be an international law without any responsibility on their part to uphold it, so long have they been convinced that

²⁶ Cf. *Bas v. Tingy*, 4 Dallas 37 (1800); Moore's Digest, VII, 156.

²⁷ Department of State Bulletin, Sept. 7, 1940, p. 201; this JOURNAL, p. 569; Supp., p. 183.

the moral obligation to distinguish between right and wrong applied to the ✓ conduct of individuals but not to that of nations; so long have they been possessed of the idea that it was only necessary for them to announce themselves as neutral and thereupon they would be guaranteed protection against the effects of foreign wars, that they cannot now bring themselves to discard the word "neutrality" for fear lest the abandonment of that status would automatically put them at war. Hence the thankless task imposed upon the lawyers to show that we can still be neutral and at the same time take advantage of every loophole in the law to send all possible aid to one of the belligerents.

(Sooner or later the American public must come to understand that the United States has a vital national interest of its own in the maintenance of ✓ international law and order; that this national interest should have led us to prevent the war by coöperation with other law-abiding states to resist aggression and to promote justice; and that neutrality as a policy announced in time of peace to apply irrespective of the nature of the conditions leading up to the war, and regardless of the deliberate aggression of one of the parties, was in itself a rejection of principles of law and order and a renunciation not only of our duty as a member of the international community, but of our rights as well. Having failed to understand in due time our interest in law and order, we must now meet the situation as best we may and pay the price of our short-sightedness.)

What name shall we now invent to describe our attitude toward the two belligerents would seem to be of little consequence. If the term "neutrality" must still be retained, let it be an "armed neutrality" which is determined to reassert the fundamental principles upon which the law of neutrality was believed to rest. The violation by Germany of the neutrality of Denmark, Norway, Holland and Belgium undermined the foundations of neutrality and justified every other neutral in denying to Germany the benefits of the observance of neutral duties. International law, even in its undeveloped form of the nineteenth century, recognized the right of every nation, even though not itself the victim of lawless conduct, to take steps to defend itself against a nation guilty of crimes so monstrous as to threaten the very existence of the law upon which all legal rights and duties depend.

The ultimate right of self-defense, which comes into being when the orderly processes of law have broken down, is as clearly recognized in public as in private life. It takes priority over all lesser obligations of the law; and it justifies a nation in resisting the lawbreaker not merely when his crime is directed immediately towards itself, but when, although directed against others, it is of such a character as to indicate that, if not resisted now, it will put the lawbreaker in a position in which he can successfully attack others who are not at the moment his victims. It is of the very nature of self-defense that it should be allowed to anticipate the future and to prevent today what it may not be possible to prevent tomorrow. Such is the nature of the Mon-

roe Doctrine which has long been justified in American foreign policy on the principle, as Senator Root once described it, of "the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself."

The United States is clearly no longer neutral in the normal, technical sense of the term. It is engaged in defending the fundamental principles of international law upon which the rights and duties of neutrals rest, as well as all other rights and duties based upon established law. It is not technically "at war" because it has not gone to the point of breaking off official relations with Germany and throwing its whole weight into the restoration of law and order. If "armed neutrality" seems an inadequate term to describe such a position, it is merely because of the defective development of international law which has no recognized status intermediate between the two extremes. The term "supporting state", used by the Harvard Draft on Aggression, would be applicable except for the fact that it has no meaning to persons not familiar with the procedure set forth in the draft. But the want of a technical term of international law to describe the position in which the United States now finds itself is of no consequence for the moment. What is of consequence is the realization that the survival of international law itself is now at issue, and that a choice must be made between the restoration of the fundamental principles of that law—the independence of the members of the international community, their equality of status, the sanctity of treaty obligations, procedure in accordance with conventions of pacific settlement—or a condition of international anarchy which can be at best only an armed peace for many years to come.

C. G. FENWICK

THE NEEDS OF INTERNATIONAL LAW

It is an anomalous situation in which the international lawyer finds himself today. If he upholds the law of nations in all its details, he may be aiding those states which recklessly disregard that law, at the expense of those who would loyally uphold it. It is a measure of the anarchy into which the nations have fallen that those which have most carefully respected the old law of nations have suffered, have even lost their existence, and that because they did respect it. On the other hand, if the international lawyer urges that vigorous action be taken to command obedience to the law which he professes, he may be confronted with minor and antiquated rules, and be accused of betraying that law. This dilemma results from the fact that states—and particularly the United States of America—have been unwilling to widen the range of international law, or to give to it the authority which it needs.

In the midst of the criticisms which now assail the law of nations, it should be noted that the law of peace has been as well respected and obeyed as has the average domestic law. The difficulty begins with the law of war—a term contradictory in itself—and with the concomitant of the law of war, the

law of neutrality. The strictures which one hears are usually evoked by acts of violence which are not covered by the law; the critic has been shocked by some act which he regards as wrongful, and which he therefore assumes is a violation of international law. He has heard of this act because it was sensational and therefore attained publicity; he does not hear of the thousands of disputes which are daily being handled, and settled, by diplomatic negotiation or by tribunals in accordance with the requirements of international law. In this respect, the criticisms are invalid, and not founded upon knowledge.

The first weakness which can properly be attributed to international law is that it does not cover important matters which it should cover. The primary purpose of any legal system is to protect the life and rights of its subjects; but this authority has never been granted to the law of nations. Writers have attempted to assert a legal right of existence for states, a duty of non-intervention in the affairs of a state; but governments have not accepted these principles in practice, nor have they been demanded or confirmed by public opinion. As a result, the law of nations has been unable to exercise the primary function of law—the restraint of violence. War, and the use of force in general, have remained legitimate; and law cannot prevail when war appears. So long as there is peace, international law operates with success and obtains respect; when war comes, it may legally be subordinated, at the will of any one nation which desires to make war, to the use of force by that nation. The law of war—an incongruous term—cannot be expected to prevail when war itself rules; even the law of peace must suffer, the more now as the octopus tentacles of modern war reach out to cover all persons and things, and even to control the activities of peacetime. To the average person, this is the important thing, and he will not have great respect for international law until it has jurisdiction over states which would use force. At the same time, he is not willing for his own state to concede this jurisdiction.

Consideration of this need reveals another weakness. It was becoming clear, at the opening of this century, that the law had developed as far as it could go upon a voluntary basis. It has become more and more manifest that the interdependence and increasing complexity and friction of modern international life, and the consequently greater danger of war, which had itself become so much more terrible and far-reaching, not only required extension of the jurisdiction of international law to cover these new problems, but also extension of its power of enforcement in these new fields within which nations might be more reluctant to submit. At the beginning of the century, this effort took the form of an attempt to establish compulsory jurisdiction over disputes between nations. The shock of the World War taught the need of effective international law, and led to an organization of nations for the purpose of upholding that law. The preamble to the Covenant of the League of Nations states as among its objects "the firm establish-

ment of the understandings of international law as the actual rule of conduct among governments," and "scrupulous respect for all treaty obligations." It attempted to expand that law, as among signatories, to cover some of the important new fields in which its jurisdiction was needed, and to back it up with some small degree of coercion. It was concerned first with the law as it is, and, weakly enough, but far in advance of past practice, with the peaceful change of that law. It recognized that law cannot prevail when war is legitimate, and therefore sought to restrain war. Such a system is indispensable, if those who prefer law to anarchy among nations are to have their wish; but the American people rejected it, and thereby set an example of sovereign independence and irresponsibility which other nations have not been slow to follow and to extend. The tragic consequences of our mistake in 1919 must never be repeated.

Worse than this refusal to support a promising effort in behalf of law and order among nations, the American people have made it clear that they do not accept any responsibility for upholding international law; they have even put this, so far as it concerns certain of their rights, into a rigid statute. They have declared that they will be neutral rather than—as is the duty of any law-abiding citizen—to uphold the law by positive action; they have reserved for the United States complete freedom of action in all circumstances. At the same time, they bitterly condemn international law for its impotence! The United States is now confronted with a situation both displeasing and dangerous; we object, but we have not strengthened the law of nations so that it could help us. On the contrary, we still refuse to go to its support against lawbreakers, and we hide behind ancient and outworn minor rules to escape this responsibility. The American people regard Japan as engaged in illegal aggression, but insist upon a neutrality which supplies her with the means of continuing this alleged illegality. They regard Germany and Italy as engaged in illegal conduct, yet are unwilling to aid those states which accept the responsibility of opposing the illegality, and offer as an excuse that some minor rule of international law stands in the way. They uphold the law in its trivialities, while abandoning it in substance.

Such a position is not only obviously illogical and disastrous, from the viewpoint of national security as well as of aiding the law, but it finds no support in the law of nations itself. It cannot be argued that a state must obey the law when its opponent does not. In the absence of a superior authority which can command obedience to the rules from both parties, no subject of the law can be expected to observe that law; to do so, in such a situation, would give enormous and unfair advantage to that adversary. This has always been recognized as true in the law of nations, which meets it by the authorization of reprisals. It gives no pleasure to the international lawyer to admit a situation in which one violation of the law calls for another; but the fault does not lie in the law—it lies with the nations which

have refused to put behind it any better sanction than reprisals and self-help. This right of reprisals would be admitted, though with distaste, by any international lawyer;¹ if it were not admitted, states would nevertheless act upon that principle. No other defence is open to a state which must rely upon itself alone to secure respect for its legal rights.

This paradoxical situation must continue as long as each state is permitted to use force toward its own ends, legal or illegal; it cannot be ended until force is made the servant, rather than the master, of the law. Whether the United States—to take the example of the present situation—may as a government sell munitions of war to a belligerent or must resort to the subterfuge of selling through individuals is not a matter of law, but of policy and discretion. There have been many violations of international law to our injury by belligerents; if we wish to retaliate by aiding their enemies, we may quite legally do so. In other words, the United States could, without going to war, if it so wished, take positive action against lawbreakers in the world; and, in so doing, violate no international law. To pretend that international law forbids us to protect our rights under that law is manifestly absurd, and can only bring the law into disrepute.

Of those who scoff at international law today, or who bemoan its impotence in this crisis, many must accept the responsibility for its failure, for they denied to it the authority which it most needs and which they would now like to see it exercise—the authority to restrain the use of violence. Law is not an independent growth, an act of nature or of God, concerning which we, as human beings or as citizens, need feel no responsibility. Law—international or other—is of human construction; it does not grow out of the ground like a weed, or materialize in the air about us. If it fails, it is because those whom it serves have not given it proper support; if it succeeds, it will be because human beings have been willing to strive for it and to sacrifice for it. The rôle of intelligence is not to condemn, but to improve; not to surrender, but to advance. As far as international law has been given jurisdiction, it has been successful; it can be successful in the most important field of all if it is given backing by those who would see order prevail in the world. The lesson is being driven inexorably home to us today, and many persons now realize that the present holocaust could have been avoided if the American people had been willing to build and uphold the law of nations. Passive surrender to lawbreaking, passive acceptance of ancient rules in new situations, is not the answer; the remedy lies in extending the jurisdiction of international law to cover the use of violence, and in putting behind it the physical power to enforce this jurisdiction. Because of

¹ For example, see Article 14 of the Harvard Research Draft Convention on Rights and Duties of Neutral States in Naval and Aërial War (this JOURNAL, Supplement, Vol. 33 (1939), p. 329): "A neutral state shall not be deemed to have violated Article 4 of this Convention by resorting to acts of reprisal or retaliation against a belligerent because of illegal acts of the latter."

past irresponsibility, we now face a terrible setback in this difficult task; but it is worth whatever effort is required. There is no answer other than the reign of law, and we may be sure, from the lessons of human experience, that the law will some day prevail. That day will not dawn until human beings accept the responsibility and the cost; it will come the sooner if we furnish now the leadership, the effort, the sacrifice which are needed.

CLYDE EAGLETON

LEASED TERRITORIES

The status of leased territory has been a matter of particular importance since late in the nineteenth century. The attempt of Germany to obtain bases in the Far East, as other European states had already done, led China to sanction "the acquirement under lease by Germany of the land extending 100 li at high tide" at Kiaochow. This lease was for a period of 99 years from 1898. This was the usual period, though some of the leases in the Far East were for periods of 25 years. When the question was raised as to what rights passed with the lease, Japan maintained that sovereignty was "too important a matter to pass thus with a lease."

The lease of Port Arthur to Russia in 1898 was "on the understanding that such lease shall not prejudice China's sovereignty" over this territory. When the general question became acute in 1900, the Minister of the United States in China reported to Secretary Hay: "I have conferred with the English, German, Russian, French, Spanish, Netherlands, and Japanese ministers upon the subject, and all of them, except the Japanese, agree that the control over all of these leased ports has, during the existence of the lease, passed as absolutely away from the Chinese Government as if the territory had been sold outright, and that they are as thoroughly under jurisdiction of the lessee governments as any portion of their home territory, and their consuls, accredited to China, would not attempt to exercise jurisdiction in any of said ports." China interpreted the lease to require the payment of annual rental and "that the territory should be self-governing, *i.e.*, under Germany, but still belonging to China." After much correspondence, Secretary Hay in 1900 concluded that the effect of China's foreign leases was "the relinquishment by China during the term of the leases and the conferment upon the foreign Powers of all jurisdiction over the territory."

It was held in the case of the lease of a strip of the Congo Free State to Great Britain in 1894, when a difference of opinion had arisen, that a lease should be strictly interpreted and did not involve the alienation of territory even when not so stated.

The same principle has been considered as in effect when territory has been leased for coaling stations, naval bases, etc. The United States had long felt the need of "naval outposts," as was emphasized in the message of President Johnson in 1867 and in the message of President Hayes in 1880. By Article III of the so-called "Platt Amendment" of March 2, 1901, the

United States acquired "complete jurisdiction" of certain areas in Cuba for naval bases but recognized "the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water," which "are therefore *leased* to the United States and not *ceded*."

By the convention with Panama in 1903 the United States acquired the right to exercise the powers it would possess if it were the sovereign of the Canal Zone, but it was to pay an annual rental of \$250,000 to Panama. When the United States negotiated with Nicaragua in 1914 a 99-year lease of Great Corn Island and Little Corn Island and a right to maintain a naval base on the Gulf of Fonseca, it was with the provision that these grants "be subject exclusively to the laws of and sovereign authority of the United States." Co-riparian states on the Gulf of Fonseca protested. The Central American Court of Justice supported the protest, and the United States affirmed that the ratification of the convention with Nicaragua was not intended "to affect any existing right of any said named States."

Sometimes the distinction between transfer of sovereignty and a lease by international convention differs little in actual operation, but, as the Japanese claimed in 1900, "sovereignty is too important a matter to pass thus with a lease."

GEORGE GRAFTON WILSON

THE MONROE DOCTRINE IN 1940

Some of the attempts to "generalize" the Monroe Doctrine have already been described in this JOURNAL.¹ The attempts finally resulted in achievement at the Inter-American Conference for the Maintenance of Peace, Buenos Aires, December, 1936. A convention there adopted envisages consultation when the peace of the Americas is threatened, with a view to coöperation in meeting the threat. The original Brazilian draft from which this convention was evolved was cast in the language used by President Monroe in 1823.² The principle of the Buenos Aires Convention was reiterated in the Declaration of the Principles of Solidarity of America, Lima, 1938.³ At the meeting of the Ministers of Foreign Affairs of the American Republics, Panama, October, 1939, the principle was given more specific content by the following resolution:

That in case any geographic region of America subject to the jurisdiction of any non-American state should be obliged to change its sovereignty and there should result therefrom a danger to the security of the American Continent, a consultative meeting . . . will be convoked . . .⁴

¹ Vol. 29 (1935), p. 105.

² See Charles G. Fenwick, "The Buenos Aires Conference: 1936," XIII Foreign Policy Reports (1937), pp. 90, 92. The text of the convention is in Department of State Publication No. 1088, Conference Series No. 33, Report of the Delegation of the United States of America, p. 17; also in this JOURNAL, Supplement, Vol. 31 (1937), p. 53.

³ Department of State Press Releases, Dec. 24, 1938, p. 474; this JOURNAL, Supp., p. 199.

⁴ Department of State Bulletin, Oct. 7, 1939, p. 334.

The second meeting of the Ministers of Foreign Affairs of the American Republics, Habana, July, 1940, adopted a number of resolutions which contain matter germane to this subject; only Numbers XV and XX need be considered here.⁵ Resolution XV declares that "any attempt on the part of a non-American State against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered as an act of aggression against the States which sign this declaration." The principle of consultation in such cases is reiterated. The statement just quoted may fairly be described as a "generalization" of one part of the Monroe Doctrine. In this sense "generalization" means an acknowledgment on the part of the United States that our traditional concern with a European attack upon American territory is shared by all of our sister republics; their interests and ours are in this respect identical. For them as for us, the interest is rooted in the need for self-defense.

Resolution XX, however, goes much beyond the original Monroe Doctrine, although something of a precedent may be found in the reiterated view of the United States during the nineteenth century that it could not countenance the transfer of Cuba from Spain to any other European state.⁶ This resolution recites the dangers to American peace which might develop out of the current European war. The principle of self-defense, upon which the Monroe Doctrine rests, is invoked by all the American Republics as justification for their common interest in the fate of the existing American possessions of European Powers. It is therefore resolved that "when islands or regions in the Americas now under the possession of non-American nations are in danger of becoming the subject of barter of territory or change of sovereignty, the American nations, taking into account the imperative need of continental security and the desires of the inhabitants of the said islands or regions, may set up a régime of provisional administration. . . ."

This resolution is supplemented by a convention dealing with the same subject and also signed at the Habana meeting. The recitals prefacing the articles of the convention refer to both transfers or extinguishments of sovereignty and to situations where the government of the European possession in the Americas is left "without a leader." It is declared that "any transfer, or attempted transfer, of the sovereignty, jurisdiction, possession or any interest in or control over any such region to another non-American State, would be regarded by the American Republics as against American sentiments and principles and the rights of American States to maintain their security and political independence." No such transfer "would be recognized or accepted by the American Republics no matter what form was

⁵ The texts of the resolutions may be found in Department of State Bulletin, Aug. 24, 1940, p. 127 ff.

⁶ In his message to Congress, Dec. 6, 1869, President Grant declared that the Spanish "dependencies are no longer regarded as subject to transfer from one European power to another." Richardson, Messages and Papers of the Presidents, Vol. VII, p. 32.

employed to attain such purposes." Moreover, "by virtue of a principle of American international law . . . the acquisition of territories by force cannot be permitted." The American Republics reserve the right to judge what effect various actions might have upon the regions in question. The American Republics "as an international community" will take such regions if the case arises, under their provisional administration; the community has "international juridical capacity to act in this manner." It is not necessary here to set forth the details embodied in the convention concerning the method of providing for this administration.

It may be noted that the United States prior to the Habana meeting had for its own part already indicated its acceptance of the ideas embodied in the resolution and convention of Habana. On June 5, the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs had reported favorably a resolution enunciating the principle of non-recognition of the transfer of territory from one to another non-American Power.⁷ The House Committee report contains a letter from Secretary Hull to Chairman Bloom dated June 4, 1940, which approves the bill. Secretary Hull asserted that "in keeping with its traditional policy, this Government must necessarily insist that such possessions shall not become the subject of barter or conquest between rival European powers or be made the scene of the settlement of European difficulties." He commented upon the resolution as follows:

The proposed resolution here in question recites (1) that the United States would not recognize any transfer and would not acquiesce in any attempt to transfer any geographic region of the Western Hemisphere from one non-American power to another non-American power and (2) that if such transfer or attempt to transfer should appear likely the United States would, in addition to other measures, immediately consult with the other American republics to determine upon the steps which should be taken to safeguard their common interests.

The first part of the resolution is in effect a restatement of the position which this Government has consistently taken for more than a hundred years. The second part of it is a reaffirmation of the policy adopted in recent years of coöperation with the other American republics in matters of common interest . . .

The House and Senate Committee reports contain an identical⁸ statement as follows:

Section 1 of the joint resolution declares the policy of the United States as opposed to the transfer of any islands or other lands in the geographic region of the Western Hemisphere by one non-American power to another non-American power, and that it will be the policy of the United States not to recognize or acquiesce in any such transfer. This resolve, in effect, declares that such a transfer would be in violation

⁷ Senate Report No. 1770 to accompany S. J. Res. 271; House Report No. 2400 to accompany H. J. Res. 556.

⁸ Save for the italicized words which do not appear in the Senate Report.

of the Monroe Doctrine. It is intended to give notice to all powers of the position the United States will take if such a transfer is *attempted or consummated*. The joint resolution becomes material and urgent at the present time by reason of the ownership by the Netherlands of certain islands in the Gulf of Mexico and the conquest of the Netherlands by Germany. The joint resolution, of course, will apply to all other similar situations that may now exist and that may arise.

It is interesting to compare the language of the Congressional resolution of January 15, 1811, twelve years before Monroe's statement:

Taking into view the peculiar situation of Spain, and of her American provinces; and considering the influence which the destiny of the territory adjoining the southern border of the United States may have upon their security, tranquillity, and commerce: Therefore,

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, That the United States, under the peculiar circumstances of the existing crisis, cannot, without serious inquietude, see any part of the said territory pass into the hands of any foreign power; and that a due regard to their own safety compels them to provide, under certain contingencies, for the temporary occupation of the said territory; they, at the same time, declare that the said territory shall, in their hands, remain subject to future negotiation.⁹

It is not unlikely that recent developments will lead to reiterations of the statement that the Monroe Doctrine has been made a part of international law. Such statements have in the past been based on Article 21 of the Covenant of the League, which reads:

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace.

The Costa Rican Government in a note to the President of the League Council on July 18, 1928, stated: "Under Article 21 of the Covenant, the international legal scope of the Monroe Doctrine was extended. It has since been converted for all the nations signatory to the Treaty of Versailles, into a constituent part of American public law."¹⁰

The President of the Council did not accept this interpretation.¹¹ Its fallacy is clear if one examines the French text of Article 21 which reads as follows:

Les engagements internationaux, tels que les traités d'arbitrage, et les ententes régionales, comme la doctrine de Monroe, qui assurent le

⁹ As quoted in J. Reuben Clark, Memorandum on the Monroe Doctrine (1930), State Department Publication No. 37, p. xii. See Moore, Digest of International Law, Vol. 6, p. 372.

¹⁰ League of Nations Official Journal, 1928; p. 1606.

¹¹ *Ibid.*, p. 1608. Cf. Report of Sub-Committee No. 4 of the First Committee of the Assembly regarding Article 21 of the Covenant, Records of the Second Assembly, 1921, p. 22 ff.

maintien de la paix, ne sont considérés comme incompatibles avec aucune des dispositions du présent Pacte.

✓ The new inter-American pronouncements do not change this juridical situation. The "generalized" Monroe Doctrine is merely a declaration of the joint and common policy of the American Republics. This joint policy, like the former unilateral policy of the United States, is based upon international law (the right of self-defense) but is not itself a legal principle. A European state violating the Monroe Doctrine may at the same time violate a rule of international law, but this would not necessarily be true, *e.g.*, if the act were justifiable under a right of intervention.

As Mr. J. Reuben Clark has properly pointed out,¹² the Monroe Doctrine itself does not include the reciprocal idea commonly associated with it, namely, the principle of American non-interference in European affairs. The Habana resolution and convention, while given an American setting, clearly involve a degree of interference in the current affairs of Europe. The extent of that interference can be measured only in the light of subsequent developments. On June 19, 1940, the American Chargé in Berlin and the American Ambassador in Rome were instructed to make a communication to the German and Italian Governments respectively. The communication referred to the French Government's request for an armistice and continued:

The Government of the United States feels it desirable, in order to avoid any possible misunderstanding, to inform Your Excellency that in accordance with its traditional policy relating to the Western Hemisphere, the United States would not recognize any transfer, and would not acquiesce in any attempt to transfer, any geographic region of the Western Hemisphere from one non-American power to another non-American power.

Similar communications were made to the Governments of France, Great Britain and The Netherlands.¹³ The Secretary of State's synopsis of the ✓ German reply contains the following paragraph:

R The German Minister of Foreign Affairs continues by remarking that in this case the interpretation of the Monroe Doctrine implicit in the communication of the government of the United States would amount to conferring upon some European countries the right to possess territories in the Western Hemisphere and not to other European countries. He states that it is obvious that such an interpretation would be untenable. He concludes by remarking that apart from this, the Reich Government would like to point out again on this occasion that the nonintervention in the affairs of the American continent by European nations which is demanded by the Monroe Doctrine can in principle be legally valid only on condition that the American nations for their part do not interfere in the affairs of the European continent.¹⁴

¹² *Op. cit.*, *supra*, note 9, p. xi.

¹³ Department of State Bulletin, June 22, 1940, pp. 681-682.

¹⁴ *Ibid.*, July 6, 1940, p. 3. The "legal validity" of the Monroe Doctrine is not actually involved.

Secretary Hull's comment on the German reply declares that "The Government of the United States pursues a policy of non-participation and of non-involvement in the purely political affairs of Europe."

The communications of the United States just quoted, as well as the Senate Joint Resolution discussed above and Section 2 of the Neutrality Act of 1939, use the expression "Western Hemisphere."¹⁵ The expression is also used frequently in current discussions of the subject. The meaning of it is not precise. According to Mr. S. W. Boggs, Geographer of the Department of State, the limits of "the geographical or historical Western Hemisphere . . . are defined neither by nature nor by common agreement."¹⁶ Mr. Boggs explains that the Northern and Southern Hemisphere "are exact concepts" measured north and south from the Equator. No such precision is possible in delimiting the Eastern and Western Hemispheres since the selection of the starting point or zero meridian is necessarily arbitrary.

. . . The Western Hemisphere is the New World which Columbus discovered by sailing west. By the Eastern Hemisphere we mean essentially the Old World, comprising Europe, Asia, and Africa; and by the Western Hemisphere we mean the American continents and appertaining islands. The continental areas of the Old World and the New World are very unequal, however, and the longitudinal extent of Africa and Eurasia is nearly 208°, which is 28° in excess of half the circumference of the equator. No simple pair of meridians 180° apart can therefore be selected which will place all of Africa and Asia within the same hemisphere — although by common consent they are regarded as belonging within the Eastern Hemisphere . . .

Within the last century the meridian of Greenwich has been increasingly used as the prime meridian in various countries, and map makers who use Greenwich as the zero meridian usually take the meridian 20° west of Greenwich at their line of demarcation in the Atlantic Ocean. In order to make a map of the Eastern or Western Hemisphere, comprising exactly one-half of the area of the earth, cartographers must therefore take the opposite meridian, namely, 160° east of Greenwich. In the Atlantic Ocean the meridian 20° west of Greenwich serves remarkably well, as it places all of Greenland, except a very small area in the northeast, within the Western Hemisphere, and the larger part of Iceland within the Eastern Hemisphere. It has the minor disadvantage of placing the Azores and the Cape Verde Islands in the Western Hemisphere, contrary to their historical association with the Old World. In the Pacific Ocean, however, the meridian 160° east of Greenwich is anomalous in that it places New Zealand in the Western Hemisphere (whereas Australia is in the Eastern Hemisphere), and that it places the eastern portion of Siberia in the Western Hemisphere . . .

Except for purposes of making maps comprising exactly one-half of the earth's surface, it therefore seems better to regard this hemisphere in which we live, in relation to the land areas of the world, as comprising

¹⁵ H. J. Res. 556 was amended to substitute "this hemisphere" for "Western Hemisphere."

¹⁶ Letter to Representative Edith Nourse Rogers, June 8, 1940, Congressional Record, June 10, 1940, Vol. 86, p. 11963.

North America (including Central America and the West Indies, and also Greenland) and South America, together with all islands appertaining to the two continents. In order to include the westernmost islands of the Territory of Alaska and to embrace an area roughly approximating one-half of the earth's surface, it is necessary to include a considerable portion of the Pacific Ocean. For convenience the international date line might be regarded as a provisional western limit of this hemisphere. The vast areas of the high seas in both the Atlantic and the Pacific have no bearing upon the practical problem of delimiting the hemispheres, except as it affects the map maker. Otherwise we are concerned only with land areas—with continents and islands, large and small . . .

A few years ago one might have assumed that the "Western Hemisphere," as the term is used in connection with such matters as discussions of the Monroe Doctrine, meant only the American continents and their adjacent islands. Today Mr. Boggs considers that Greenland is clearly included; he does not discuss the status of the Arctic and Antarctic regions, but in political parlance they would probably be included. Colonel Lawrence Martin maintains that all geographers agree on including Greenland as part of the Western or American Hemisphere.¹⁷ The northeast cape of Greenland is farther east than the easternmost point of Iceland but, according to Colonel Martin, Steffansson¹⁸ has convincingly shown that Iceland is part of the Western Hemisphere. Colonel Martin also included part of Antarctica. Just what Pacific islands are comprised is apparently open to question:

It would be immaterial to consider the definition of the Western Hemisphere, or "this Hemisphere" as President Monroe called it, were it not that labels become fixed in the public mind and tend to acquire an artificial content. It might be said that any attack on Iceland must be resisted by the United States if the Monroe Doctrine is to be upheld; the statement would be supported by testimony that Iceland is in the Western Hemisphere. A similar geographical argument might be made with reference to New Zealand. From an historical point of view there would be no justification for such an argument, which would cause the shade of James Monroe to shudder. Political justification would need to be found in the current foreign policy of the United States; it would be impossible to fit the defense of Iceland into the Habana policy which relates to the "Americas." (From the point of view of international law, the link with the Monroe Doctrine, if any, lies in the basic right of self-defense.) (Law may and indeed must take account of facts. It is a fact that the American orbit of defense is broader than it was a century ago.) With the steady development of aeronautics, this range of interest will tend to increase. If the necessities of self-defense justified our interest in Cuba in the 1860's, they may justify a

¹⁷ "The Geography of the Monroe Doctrine and the Limits of the Western Hemisphere," *Geographical Review*, July, 1940, p. 525.

¹⁸ *Iceland: The First American Republic* (1939).

like interest in Hawaii today. But the life of the law, we are taught, is not logic but experience. Now or in a few years' time, a logical argument could be built to support a war of self-defense waged by the United States on the Yangtze or the Volga or the Congo. In essence the argument would surely be political and not legal. At present, the "generalization" of the Monroe Doctrine does not exceed the regional bounds of that traditional policy. But a Monroe Doctrine generalized globally retains a label while casting aside the substance.¹⁹ It may or may not be a wise policy for the United States to adopt, but it would be definitely misleading to cloak it in traditionalism.

PHILIP C. JESSUP

JAPAN JOINS THE AXIS

Japan has signed with Germany and Italy an alliance for a term of ten years. This formally ties the military and political fortunes of the Axis Powers and their neophyte from Asia. If present signs and past action give any true indication of her future conduct, Spain also will join the tripartite Axis Powers or continue to extend to them the practical equivalent of a most benevolent neutrality. This momentous political union represents in part a perfectly understandable revolt of vigorous "have not" Powers against the preëption by the "have" Powers of the area available for national expansion. In part it indicates a bond of fear uniting Japan to the Axis. They have a common fear that the intervention of the United States in Asia and the aid given Britain will become increasingly vigorous and menace Japan's ambitions for expansion through conquest and Germany's aims for European domination by subduing Great Britain.

Under Secretary Welles in his recent address¹ before the Foreign Affairs Council stated that there were no differences in the Far East that could not be settled by negotiation if the will to reach a peaceful settlement devoid of aggression existed. But Japan has evidently embarked upon a course which has not up to the present given any indication that she wishes to negotiate upon that basis. The condition which confronts the United States as a result of this threefold alliance is serious. The aggressor states are for the present in virtual control of continental Europe and have a preponderance of power in the Orient. The continuance of the Axis control over Europe is menaced by the heroic defense of Britain's "tight little island" and by the constantly increasing coöperation Great Britain derives in the supplies and sympathy from the United States and Latin America, not to mention the heroic warfare which Canada and the other members of the British Commonwealth of Nations are waging in consequence of their voluntary decision to throw the resources of the entire Commonwealth into the struggle.

And thus we find the whole world divided into two groups—the Axis

¹⁹ Cf. President Wilson's phrase in his speech of Jan. 22, 1917: "The doctrine of President Monroe as the doctrine of the world."

¹ Address of the Honorable Sumner Welles, Under Secretary of State, before the Foreign Affairs Council, Cleveland, Ohio, Sept. 28, 1940.

Powers and those that oppose their aggressions and designs of conquest. If the Axis should obtain a complete victory and dominate the entire world, such a Pax Hitleriana would soon break up or divide into two parts, as did the Roman Empire into the Empire of the East and an Empire of the West. One-half would embrace those regions or peoples more nearly satisfied with totalitarian régime, as well as those caught in the mesh of geographical proximity to the military control of the Axis Powers. The other half would include those countries which were most discontented under Hitlerian regimentation and control and were most capable of making an effective resistance to the imposition of that régime.

If the British succeed in utterly defeating Hitler and restore "Humpty-Dumpty" Europe in as far as that is socially and politically possible, the victors will have to show very different qualities of statesmanship from what they displayed in the peace settlements of the last world war. If they would entertain any aspirations of building a permanent edifice of world peace, they must needs recognize the existing trends of political and especially of economic and social evolution, and they must refrain from reserving for themselves more of the earth's territory and resources than they can effectively police and develop for the common benefit of mankind.

It is, perhaps after all, not likely that either of the contesting groups will be able to defeat the other. It may well be that the final outcome will be a draw—a draw which will recognize the futility of further military operations and bring about a technical peace. But this state of technical peace will initiate a condition of economic warfare on a scale hitherto undreamt of. The probability of a draw is made all the more likely by the rôle played by the wily Stalin. Russia must be in deadly fear of the day when a victorious Germany will resume her long anticipated and, before the present war, loudly proclaimed intention of annexing the Ukraine. Russia must likewise fear that a victorious Japan will cramp her expansion and development in China and Siberia. The ideological basis for the Anti-Comintern Pact still exists, even though the pact itself has been placed in cold storage. Naturally Stalin will wish to hold aloof from too close an association with the Axis Powers that cherish, even when they do not openly profess, anti-communistic doctrine. Self-interest, even self-preservation, must induce him to favor the Anglo-American group that harbors no aggressive designs against Russia's vast and loosely knit possessions.

But conflicting motives complicate the situation and influence Russian policy, for the Union of Soviet Republics cherishes its own ideological basis for the direction of its foreign policy, namely, the urge to overthrow capitalistic states. Stalin may play fast and loose with this aim as a basis for Russia's foreign policy, but he must cater to a strong popular group that would like to destroy the democratic governments of Great Britain and the United States and set up in their place a communistic proletarian régime. As a result of these conflicting influences, we may confidently expect that Russia will favor the Anglo-American group, but at the same time try to

prolong the struggle. She will push this policy as far as it can be driven without the risk of aiding the Axis Powers to achieve a victory. Consequently, the effect of Russian influence will almost certainly be to prevent a clear-cut victory for either side.

If, then, a draw results with a condition of technical peace, the totalitarian Powers, using their military control within the confines of their controlled domain, will organize a great unified world market in which each region will be allotted its particular sphere and function. This may well demonstrate considerable efficiency over the previous ineffectual régime of a Europe which from an economic viewpoint was in a semi-anarchic condition. But the liberal Powers for their part will also develop among their own group of adherents a corresponding coördinated economic régime, only this will necessarily be achieved through reliance upon the political intelligence and support of the whole group of democracies and liberal-minded individuals. Through conference and a spirit of reasonable compromise, they will together work out an analogous counterpoise and counterpart to the Hitlerian Empire. In this association of democratic peoples the largest possible measure of vivifying creative force consistent with economic and social efficiency will be retained.

A world divided on such a basis might present a more perfect and stable balance of power than has yet been known to human history. Each group would seek to check its rival, and the keenness of the resulting competition would serve as a stimulus to progress such as the world has never known. Just as in our own national affairs, political health and social well-being are promoted by our system of two nearly equally balanced political parties, and ballots are substituted for bullets; so in such a divided world neither group would be in a position to have recourse to the suicidal arbitrament of war. The ancient world in the presence of the Persian and the Roman Empires knew the blessings of a long period of peace. Henry Maine² pointed out that international law could not exist when the world was apportioned between the Roman and the Persian Empires. The dualism resulting from another partition of the world into two groups of states would necessarily affect international law as we have known it; that is, a law superior to several score of politically independent states. In its place we should have a system of macro-constitutional law and an area of political compromise and necessary coöperation between the two groups. Certain fundamental principles, such as respect for envoys and the observation of good faith and respect for treaties, would still prevail and be, perhaps, better observed than they are today. Whatever may be the outcome of the present conflict, it is the universal hope of all people that the peace settlement may bring peace, not only in our day, but in the day of the generations which are to follow after us.

ELLERY C. STOWELL

² " . . . though of course in a world which was divided between two great rival sovereigns, the Roman Emperor and the King of Persia, there was little room for Law of Nations in the true sense of the word." Henry Maine, *International Law*, London, 1894, p. 29.

CURRENT NOTE

EIGHTH INTERNATIONAL CONFERENCE OF AMERICAN STATES

The Eighth International Conference of American States convened at Lima, Peru, on December 9, 1938, pursuant to a resolution adopted by the Seventh Conference and invitations issued by the Government of Peru. It adjourned on the 27th of the same month. During the eighteen days the conference was in session, there were seven plenary meetings and practically continuous sessions of the seven committees and numerous subcommittees among which the 169 projects introduced into the conference were distributed for detailed examination and reports. No treaties or conventions were adopted at Lima, but the conference approved 112 declarations, resolutions, and recommendations.¹ The governments of all the American Republics were represented.

The atmosphere in which the conference met was irresistibly affected by events taking place in other parts of the world. As to questions of world importance affecting the American Republics, the conference at Lima might be considered as an adjourned meeting of the Inter-American Conference for the Maintenance of Peace which met at Buenos Aires in December, 1936. It took stock of international repercussions since the conference of 1936 and reaffirmed more emphatically the determination of the American Republics to keep the ravages of war away from the shores of the Western Hemisphere; to live the life of the good neighbor among themselves, politically, economically, and culturally; and to safeguard their national independence and individual liberties from dangers which may threaten from any quarter.

The first substantive resolution to be adopted by the conference was on the subject of reduction of barriers to international trade. It was in the nature of a tribute to the trade agreements policy which Secretary Hull has made a cardinal point in his administration of the foreign policy of the United States. The resolution had the distinction of being unanimously proposed by all the delegations. (See No. II, *Supplement*, p. 190.)

No military or political alliance was sought by the United States. Secretary Hull expressly stated in his opening address that "each of our nations obviously must decide for itself what measures it must take in order to meet its share of our common interest and responsibility in this respect."

Two years before at Buenos Aires the American Republics had adopted a declaration of inter-American solidarity and coöperation. At Lima these principles were unanimously restated more specifically in a declaration officially entitled the "Declaration of Lima." (See No. CIX, *Supplement*, p. 199.)

¹ The principal texts involving international law are reprinted in the Supplement to this JOURNAL, pp. 190-201.

Moreover, the conference at Lima thought it advisable to restate categorically in the form of a declaration the principles that the American Republics regard as essential in the preservation of world order under law, in the maintenance of peace with justice, and in the achievement of the social and economic welfare of mankind. (See No. CX, *Supplement*, p. 200.)

Consultation as a means of settling international controversies and preventing war had been introduced into the conventions and resolutions adopted at Buenos Aires in 1936, but again the Lima conference felt it desirable to go a step farther in this direction, and accordingly a declaration was adopted introducing improvements in the procedure of consultation. (See No. CVII, *Supplement*, p. 199.)

The proscription of war in the Americas was emphasized in two other resolutions adopted at Lima. (See No. XVI, Defense of Human Rights, *Supplement*, p. 194; and No. XXVI, Non-Recognition of the Acquisition of Territory by Force, *ibid.*, p. 197.)

A report on the subject of sanctions and the definition of the aggressor, prepared by the Committee of Experts on the Codification of International Law, came before the conference for action, but the conference expressed the view that "under the present status of international law and international relations in America, a special definition of aggression and the establishment of sanctions are not urgent since the pacific and juridical relations which exist between the countries of America do not warrant them." However, the conference transmitted the report and projects on this subject to the International Conference of American Jurists at Rio de Janeiro for study in connection with a general plan for a continental juridical organization.

The conference also had before it several projects for the creation of an Inter-American Court of International Justice, with an analysis prepared by the Governing Board of the Pan American Union and a study by the Committee of Experts on the Codification of International Law. This proposal was unfinished business from several preceding conferences, but the Lima conference only felt warranted in adopting a declaration "That it is the firm purpose of the States of the American Continent to establish an Inter-American Court of International Justice, whenever these States may recognize the possibility of doing so with complete assurance of success; and that in the meantime the study of an adequate statute on which international justice in America may rest should be encouraged."

A question which gave concern to the delegates at Lima was the status and activities of foreigners, and two resolutions were adopted on the subject, one (No. XXVII, *Supplement*, p. 198), on foreign minorities, and the other (No. XXVIII, *Supplement*, p. 198), on the political activities of foreigners. At the same time, the conference adopted another declaration decrying persecution for racial or religious motives. (No. XXXVI, *Supplement*, p. 198.)

Methods for the codification of international law have been discussed

at the Pan American conferences for a number of years. The Lima conference undertook to revise the procedure somewhat, and a detailed resolution on the subject appears in the Final Act. (See No. XVII, *Supplement*, p. 194.)

Besides providing an opportunity for discussing and proposing solutions of questions arising between the American nations, these international conferences are becoming more and more a forum for the consideration of problems internal to each nation but common to many of them, upon which they are desirous of benefiting by the experience of others or of establishing some common policy or standard of conduct. A number of resolutions adopted at Lima were of this character. Such, for instance, were those on the uniformity of commercial and civil law, commercial arbitration, the improvement of labor legislation, the protection of the indigenous population, the declaration in favor of women's rights and related resolutions, the protection and preservation of wild life, and several resolutions dealing with the admission and treatment of immigrants. There was also a series of resolutions dealing with the improvement of cultural relations among the peoples of the Americas, and a large number referring subjects not sufficiently developed for further study and report by the Pan American Union.

Proposals are made from time to time that there should be a league of American nations. Such a proposal was before the Lima conference and was referred to the consideration of the International Conference of American Jurists. A perusal of the proceedings and acts of the International Conferences of the American States must impress one, however, with the reality of an association of American nations already in existence. It is true that there is no written convention or pact expressly creating such an association. For half a century, nevertheless, its unwritten constitution has been in the making. The eight international conferences held at intervals of approximately five years, constitute a legislative organ of the American Republics acting collectively. The treaties, conventions, resolutions, and recommendations of the conferences make up a code of law and principles, some in effect in whole or in part, others perhaps forgotten or overlooked, but which, if generally ratified and enforced, would in themselves constitute important chapters in articles of association of the American nations. In the Pan American Union the American Republics have a secretariat the activities of which are expanded or contracted according to the needs of the times. The meetings of the Ministers of Foreign Affairs of the American Republics, two of which have been held since the Lima conference, for consultation in international emergencies affecting the American continents, provide an efficient Executive Council for the American association of nations.

GEORGE A. FINCH

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 16—AUGUST 15, 1940
(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Chunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *R. A. I.*, Revue aéronautique internationale; *U. S. T. S.*, U. S. Treaty Series.

January, 1940

- 8 GREAT BRITAIN—PORTUGAL. Exchanged notes at Lisbon respecting documents of identity for aircraft personnel. Text: *G. B. T. S.*, No. 15 (1940), *Cmd.* 6209.

- 30/February 28 NEW ZEALAND—UNITED STATES. Exchange of notes at Wellington, regarding certificates of air-worthiness for export. Text: *Ex. Agr. Ser.*, No. 167.

February, 1940

- 14/19 NICARAGUA—UNITED STATES. Exchange of notes at Managua regarding exchange of official publications. Text: *Ex. Agr. Ser.*, No. 171.

March, 1940

- 6-19 CONFERENCE OF JURISCONSULTS. Delegates from eight countries reconvened at Montevideo after adjournment from Aug. 4, 1939. Adopted revised texts of the treaties signed in 1939: (1) Asylum and Political Refugees; (2) Intellectual Property (Copyright); (3) Exercise of the Liberal Professions. New treaties were signed as follows: (1) Civil Law; (2) Penal Law; (3) Processal Law; (4) Commercial Law; (5) Commercial Navigation; and an Additional Protocol. *D. S. B.*, June 8, 1940, p. 631.

- 16 DOMINICAN REPUBLIC—NEWFOUNDLAND. Exchanged notes at Ciudad Trujillo regarding commercial relations. Texts: *G. B. T. S.*, No. 14 (1940), *Cmd.* 6208.

April, 1940

- 21 INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW. Fundamental Statute entered into force. Belgium, Bolivia, Colombia, Finland, Germany, Greece, Hungary, Ireland, Italy, Lithuania, The Netherlands, Nicaragua, Rumania, Spain, Sweden, Switzerland and Uruguay have adhered. *D. S. B.*, Aug. 10, 1940, pp. 109-110.

May, 1940

- 13-16 NATURE PROTECTION AND WILDLIFE PRESERVATION. Committee of Experts, established under Res. 38 of the 8th International American Conference, at meetings in Washington, formulated a draft convention which was deposited with the Pan American Union, and will be open for signature by American Republics on Oct. 12, 1940. It will come into force three months following the deposit of five ratifications. *P. A. U.*, August, 1940, p. 599.

- 16 INTER-AMERICAN BAR ASSOCIATION. Delegates from the United States, Brazil, Costa Rica, Colombia, Venezuela, Cuba and Puerto Rico signed constitution during the Scientific Congress at Washington. *P. A. U.*, August, 1940, p. 597.
- 18 BELGIAN AND DUTCH INVASION. The American Republics in a joint declaration denounced the invasion of the Low Countries. Text: *N. Y. Times*, May 19, 1940, p. 25; *D. S. B.*, May 25, 1940, p. 568.
- 18 EUPEN-MALMEDY-MORESNET. Chancellor Hitler issued proclamation decreeing the reincorporation into the Reich of these districts. *N. Y. Times*, May 20, 1940, p. 1; *London Times*, May 21, 1940, p. 5; *B. I. N.*, June 1, 1940, p. 677.
- 20 IRAQ—UNITED STATES. Exchanged ratifications at Baghdad of the treaty of commerce and navigation, signed Dec. 3, 1938. In force June 19, 1940. *D. S. B.*, May 25, 1940, p. 586. Proclaimed by the United States May 29, 1940. *D. S. B.*, June 1, 1940, p. 616. Text: *U. S. T. S.*, No. 960.
- 20 NETHERLANDS EAST INDIES. Japanese and Australian officials exchanged assurances of their countries' intent not to change the *status quo*. *N. Y. Times*, May 20, 1940, p. 2.
- 20-29 EUROPEAN DANUBE COMMISSION. The spring session was held at Galatz, Rumania. *N. Y. Times*, May 21, 1940, p. 8.
- 21 ANTARCTIC REGIONS. Announcement made at Buenos Aires that Argentina has appointed Isidoro Ruiz Moreno, Capt. F. J. Clarizza and A. J. Galmarini to a committee to watch over its interests in the Antarctic. *N. Y. Times*, May 22, 1940, p. 17.
- 24 SCUTTling OF GERMAN SHIP. The President of Panama, in notes to Great Britain and Germany, declared that the American Republics regard the scuttling of the *S.S. Hanover* off the Dominican coast in March as a violation of the Declaration of Panama. *N. Y. Times*, May 25, 1940, p. 7. Text: *D. S. B.*, May 25, 1940, p. 568.
- 24/June 29 MEXICAN AGRARIAN CLAIMS. United States and Mexico agreed in an exchange of notes on May 24 that the period for the adjudication of agrarian claims by American citizens whose farm properties have been expropriated since Aug. 30, 1927, be extended to June 30, 1940. *D. S. B.*, June 8, 1940, pp. 626-627. The Mexican Ambassador at Washington handed a check to the Secretary of State on June 29 for one million dollars, under the arrangement effected by notes of Nov. 9 and 12, 1938. This is the second payment of one million dollars under this arrangement, the first having been made on May 31, 1939. *D. S. B.*, June 29, 1940, p. 706; *N. Y. Times*, June 30, 1940, p. 18.
- 25-June 1 PAN AMERICAN CONFERENCE OF COMMERCIAL AGENTS. United States Government accepted invitation on May 8 to participate in the second conference held at Rio de Janeiro, May 25 to June 1. *D. S. B.*, May 11, 1940, p. 526.
- 26/31 SOVIET RUSSIA—YUGOSLAVIA. Text published May 26 of the trade treaty signed May 11. Ratifications exchanged May 31. *B. I. N.*, June 1 and 15, 1940, pp. 698, 765.
- 28-June 17 EUROPEAN WAR. Premier Reynaud of France announced the surrender of the Belgian Army. Text of announcement: *N. Y. Times*, May 29, 1940, p. 4; *London Times*, May 29, 1940, p. 5. On June 9 Norwegian High Command ordered the Army to cease hostilities at midnight. King Haakon and the government left the country. Text of statement: *N. Y. Times*, June 11, 1940, p. 16. Italian declaration of war on June 10, effective at midnight. Text: *N. Y. Times*, June 11, 1940, p. 4. Spanish Government decree of June 13 announced non-

- belligerency of Spain. London *Times*, June 14, 1940, p. 5; *B. I. N.*, June 29, 1940, p. 827. Premier Reynaud issued two appeals to United States for assistance on June 10 and 13. Texts: *N. Y. Times*, June 14, 1940, p. 6. German troops entered Paris June 14. *N. Y. Times*, June 15, 1940, p. 1. President Roosevelt replied June 14 to M. Reynaud. Text: *D. S. B.*, June 15, 1940, pp. 638-639. Marshal Pétain, Premier of France, broadcast a message of capitulation to Germany on June 17. Text: *N. Y. Times*, June 18, 1940, p. 4; London *Times*, June 18, 1940, p. 6. Summary: *N. Y. Times*, June 24, 1940, pp. 1, 3; London *Times*, June 24, 1940, p. 6.
- 30-31 BELGIUM. The Cabinet issued a decree stating it is impossible for King Leopold to reign. Text: London *Times*, May 31, 1940, p. 6. 89 deputies and 54 senators, members of the Belgian Parliament, at Limoges, France, voted approval of Premier Pierlot's denunciation of King Leopold, and pledged support to the Cabinet in fighting for independence. *N. Y. Times*, June 1, 1940, p. 2; London *Times*, June 1, 1940, p. 5.
- 31 ALLIED SUPREME WAR COUNCIL. Tenth meeting held in Paris. Communiqué reaffirmed unity of aims. *N. Y. Times*, June 2, 1940, p. 40. Text: London *Times*, June 3, 1940, p. 6.
- June, 1940*
- 1 PORTUGAL—VATICAN. Ratified concordat at Lisbon, reconfirming Church properties in Portugal. *N. Y. Times*, June 2, 1940, p. 42; *B. I. N.*, May 18, 1940, p. 632.
- 2-July 19 LEAGUE OF NATIONS—WITHDRAWALS. Chile's withdrawal became effective June 2. *N. Y. Times*, June 3, 1940, p. 3. Rumania announced, July 11, and Denmark, on July 19, decisions to withdraw. Venezuela's withdrawal became effective July 15. *B. I. N.*, July 27, 1940, pp. 958, 980.
- 5 ALIEN SEAMEN. Executive Order set forth regulations concerning documents required of *bona fide* alien seamen entering the United States. *N. Y. Times*, June 6, 1940, p. 12. Text: *D. S. B.*, June 8, 1940, pp. 620-621.
- 5/July 1 ALIENS IN THE UNITED STATES. Executive Order set forth regulations concerning documents required of aliens entering the United States. *N. Y. Times*, June 6, 1940, p. 12. Text: *D. S. B.*, June 8, 1940, pp. 622-624. Documentary requirements for alien residents of the United States are listed in regulations, effective July 1, 1940, relating to Canadian and Mexican entries. *D. S. B.*, July 6, 1940, pp. 14-15.
- 6 GREAT BRITAIN—RUMANIA. Signed financial and trade agreement at London. *N. Y. Times*, June 7, 1940, p. 8; *B. I. N.*, June 15, 1940, p. 747.
- 8 GERMANY—GREECE. Signed economic agreement at Berlin regarding Greek ore and German coal. *N. Y. Times*, June 29, 1940, p. 6.
- 9 JAPAN—SOVIET RUSSIA. Official announcement from Moscow stated agreement had been signed regarding exact frontiers, where fighting occurred last year. *N. Y. Times*, June 11, 1940, p. 16; London *Times*, June 11, 1940, p. 5; *B. I. N.*, June 15, 1940, p. 753.
- 10 GERMANY—SOVIET RUSSIA. Signed agreement in Moscow regarding "border incidents." *N. Y. Times*, June 16, 1940, p. 24; London *Times*, June 17, 1940, p. 5; *B. I. N.*, June 29, 1940, p. 810.
- 10 TERRITORIAL WATERS. Presidential proclamation prohibited use of ports or territorial waters of the United States by submarines of foreign belligerent states. Text: *D. S. B.*, June 15, 1940, p. 641. See this JOURNAL, Supp., July, 1940, p. 171.

- 10 TRAVEL BY UNITED STATES CITIZENS. Regulations of the 1939 Neutrality Act and amendment, were extended to prohibit travel on Italian ships. *D. S. B.*, June 15, 1940, pp. 644-645.
- 10 UNITED STATES NEUTRALITY. President Roosevelt proclaimed (1) a state of war between Italy, and Great Britain and France; (2) the neutrality of the United States; (3) the extension to Italy of an earlier proclamation concerning use of ports and territorial waters by submarines of foreign belligerent states. He also issued executive order prescribing regulations for the enforcement of neutrality. Texts: *D. S. B.*, June 15, 1940, pp. 639-640, 643. See this JOURNAL, Supp., July, 1940, p. 171.
- 10-11 WAR DECLARATIONS. Italy and Canada declared war on June 10; Australia, India, New Zealand, South Africa on June 11. *N. Y. Times*, June 11, 1940, p. 4; *London Times*, June 12, 1940, p. 5; *B. I. N.*, June 29, 1940, pp. 797, 818; 823, 826.
- 11/July 15 COMBAT AREA. Presidential proclamation defined a new combat area, due to Italy's entrance into the war. Text: *D. S. B.*, June 15, 1940, pp. 641-643; this JOURNAL, Supp., July, 1940, p. 171. Department of State regulations, issued July 15, 1940, set forth certain exceptions. Text: *D. S. B.*, July 13, 1940, p. 24.
- 12 ALLIED SUPREME WAR COUNCIL. Eleventh meeting held in France. *N. Y. Times*, June 13, 1940, p. 2.
- 12 EGYPT—ITALY. Severed diplomatic relations. *B. I. N.*, June 29, 1940, p. 802; *London Times*, June 13, 1940, p. 6; *N. Y. Times*, June 13, 1940, p. 4.
- 12 FRANCE—THAILAND (SIAM). Signed non-aggression treaty at Bangkok. *London Times*, June 13, 1940, p. 5.
- 12 GREAT BRITAIN—THAILAND (SIAM). Signed non-aggression treaty at Bangkok. *London Times*, June 13, 1940, p. 5; *B. I. N.*, June 29, 1940, p. 814; *Cmd.* 6211; *D. S. B.*, Aug. 24, 1940, pp. 170-171.
- 12 JAPAN—THAILAND (SIAM). Japanese Foreign Office announced conclusion of a treaty of amity and friendship. *N. Y. Times*, June 13, 1940, p. 1. Main points: *London Times*, June 13, 1940, p. 5; *B. I. N.*, June 29, 1940, p. 820.
- 12/19 TIENTSIN, CHINA. The British Ambassador to Japan and Vice Foreign Minister Tani reached agreement on maintenance of law and order, and the silver and currency question. *N. Y. Times*, June 13, 1940, p. 1; *London Times*, June 13, 1940, p. 6. Formal agreement signed at Tokyo on June 19. *N. Y. Times*, June 20, 1940, p. 6; *London Times*, June 20, 1940, p. 5; *Cmd.* 6212.
- 13 GERMANY—TURKEY. Signed trade agreement at Ankara providing for the exchange of Turkish tobacco for German machinery parts. *N. Y. Times*, June 14, 1940, p. 5; *B. I. N.*, June 29, 1940, p. 810.
- 13 PARIS—OPEN CITY. French and German war Communiqués stated, in accordance with 1907 Hague Convention No. IV, Paris had been declared an open city. Texts of communiqués: *N. Y. Times*, June 15, 1940, p. 2; *London Times*, June 14, 1940, p. 6.
- 14 MONETARY AGREEMENT. British, French, Belgian, Netherlands monetary agreement signed at London. *N. Y. Times*, June 15, 1940, p. 2; *B. I. N.*, June 29, 1940, p. 813.
- 14 TANGIER. With approval of Great Britain, France and Italy, the Spanish Government announced entrance of Moroccan troops into Tangier in order to guarantee "the neutrality of the international zone," which was established under a conven-

- tion signed in 1903. *N. Y. Times*, June 14, 1940, p. 1; *B. I. N.*, June 29, 1940, p. 804.
- 15 AMERICAN SCIENTIFIC CONGRESS (8TH). The Governing Board of the Pan American Union, approved a report from the Scientific Congress, recommending the establishment of (1) Inter-American Conservation Commission; (2) Pan American Soil Conservation Commission; (3) Committees to establish an Inter-American Institute of Tropical Agriculture and to promote rubber production in the Americas. Text of resolution: *P. A. U.*, July, 1940, pp. 538-540.
- 15-16 BALTIC STATES—SOVIET RUSSIA. Russian troops marched into Lithuania June 15. *N. Y. Times*, June 16, 1940, p. 1. Russia announced Estonia and Latvia had agreed to free passage of Soviet troops and to the formation of new governments. *N. Y. Times*, June 17, 1940, pp. 1, 6. Excerpts from Russian statements and quotations from Premier Molotoff's remarks: *N. Y. Times*, June 17, 1940, p. 6.
- 16/July 11 PÉTAİN, MARSHAL HENRI. Became Prime Minister on the resignation of Paul Reynaud on June 16. *N. Y. Times*, June 17, 1940, p. 1; *London Times*, June 17, 1940, p. 6. Became head of the state on July 11, succeeding President LeBrun. *N. Y. Times*, July 12, 1940, p. 1.
- 17 FRANCE—GREAT BRITAIN. The French Cabinet rejected a proposal to merge the two empires into a single government to carry on the war. Text of proposal: *N. Y. Times*, June 18, 1940, p. 9.
- 17 GERMANY—URUGUAY. Germany sent note protesting anti-Nazi agitation. *N. Y. Times*, June 20, 1940, pp. 1, 8.
- 17 TRANSFER OF FRENCH CREDITS. President Roosevelt signed Executive Order of April 10, amended May 10, 1940, extending all provisions thereof to property of France and its nationals. *D. S. B.*, June 22, 1940, p. 682. The amount is estimated at more than one billion dollars. *N. Y. Times*, June 18, 1940, p. 15.
- 17 WESTERN HEMISPHERE. United States sent identic notes to Germany and Italy stating that, in accordance with its traditional policy relating to the Western Hemisphere, the United States would not recognize transfer of any geographic region there from one non-American nation to another non-American Power. Text of notes: *N. Y. Times*, June 20, 1940, pp. 1, 10; *D. S. B.*, June 22, 1940, pp. 681-682. The Governments of Great Britain, France and The Netherlands have been informed in the same sense.
- 18 CANADA—UNITED STATES. Exchange of notes facilitating the purchase and sale of foreign currency and securities by United States citizens resident in Canada. *N. Y. Times*, June 19, 1940, p. 11. Text: *D. S. B.*, June 22, 1940, pp. 699-701; *Ex. Agr. Ser.*, No. 174.
- 19 TRANSFER OF CREDITS. United States Treasury exempted from the freezing order assets in the United States of invaded nations and withdrawals on accounts in American banks by United States citizens, domiciled in Dutch East and West Indies. *N. Y. Times*, June 20, 1940, p. 11.
- 19-20 FRENCH INDO-CHINA. Announcement made at Tokyo of demands on France to stop arms traffic to China. *N. Y. Times*, June 20, 1940, p. 6. The French Ambassador at Tokyo signed June 19 a declaration of general principles regarding transit of munitions. *B. I. N.*, June 29, 1940, p. 821.
- 20 BRAZIL—GREAT BRITAIN. Effected trade agreement by exchange of notes at Rio de Janeiro. *N. Y. Times*, June 21, 1940, p. 14.

- 21 ITALY—JAPAN—MANCHUKUO. Signed trade agreement at Rome. Agreement reached also in regard to Italian possessions in East Africa. *International Gleanings from Japan* (Tokyo), July 15, 1940, p. 2.
- 21-25 EUROPEAN WAR. On June 21 the French delegation received in the forest of Compiègne the terms of the German demands. *N. Y. Times*, June 22, 1940, p. 1; *London Times*, June 22, 1940, p. 6. Armistice signed June 22. *N. Y. Times*, June 23, 1940, p. 1. An Italian communiqué of June 20 announced the French Government had requested an armistice and that a reply had been made through the Spanish Government. *N. Y. Times*, June 21, 1940, pp. 1, 15. French and Italian plenipotentiaries met June 23 near Rome to discuss terms. *N. Y. Times*, June 24, 1940, pp. 1, 4; *London Times*, June 24, 1940, p. 6. Great Britain repudiated June 23 the government of Marshal Pétain and announced it would deal henceforth with a French National Committee, formed in London under Gen. Chas. de Gaulle. *N. Y. Times*, June 24, 1940, p. 1. The French-Italian armistice was signed June 24 and both armistices became effective June 25 at 1:35 a.m., German time. *N. Y. Times*, June 25, 1940, p. 1. Terms of both armistices: *N. Y. Times*, June 26, 1940, pp. 4, 5; this JOURNAL, Supp., pp. 173, 178. Brief summaries: *London Times*, June 24 and 26, 1940, p. 6; *B. I. N.*, June 29 and July 13, 1940, pp. 779-780, 852-854.
- 22-July 30 MEETING OF FOREIGN MINISTERS OF THE AMERICAN REPUBLICS (2d). The meeting opened July 21. Text of Cuban President's welcome: *N. Y. Times*, July 22, 1940, p. 8. United States delegation: *D. S. B.*, July 13 and 20, 1940, pp. 25 and 34. Text of Secretary Hull's address on July 22: *N. Y. Times*, July 23, 1940, p. 14; *D. S. B.*, July 27, 1940, pp. 42-47. The following agreements were reached on July 29: (1) Convention covering legal phase of plan regarding Foreign Possessions in the New World; (2) Neutrality Committee Report; (3) Action on Foreign Activities; (4) Declaration on Inter-American Economics. Texts: *N. Y. Times*, July 30, 1940, p. 6. English texts of Final Act and Convention: *D. S. B.*, Aug. 24, 1940, pp. 127-148. Statement of Mr. Hull at close of meeting: *D. S. B.*, Aug. 3, 1940, pp. 65-68.
- 24 BRAZIL—UNITED STATES. Exchange of notes providing for exchange of official publications, came into force. *D. S. B.*, July 13, 1940, p. 27.
- 24-July 17 GREAT BRITAIN—JAPAN. Agreement to close the Burma road for a period of three months from July 18 handed to Parliament. *Foreign Policy Bulletin* (New York), July 26, 1940.
- 25 SWEDEN—UNITED STATES. Regulations issued for enforcement of the provisions of double income taxation convention, signed March 23, 1939. Text: *D. S. B.*, June 29, 1940, pp. 718-719.
- 27 SHIPS IN UNITED STATES TERRITORIAL WATERS. Presidential proclamation authorized Secretary of Treasury and Governor of Panama Canal to seize any domestic or foreign vessels in American ports. *N. Y. Times*, June 28, 1940, pp. 1, 7. Action was taken under authority of Sec. I, Tit. II, Espionage Act of June 15, 1917. *D. S. B.*, June 29, 1940, pp. 707-708.
- 27-July 3 RUMANIA—SOVIET RUSSIA. Rumania acceded on June 27 to Russian territorial demands. Outline of demands: *N. Y. Times*, June 28, 1940, pp. 1, 12. Text of communiqué: *N. Y. Times*, June 29, 1940, p. 8; *London Times*, June 29, 1940, p. 6. Russian occupation of ceded provinces to be completed by noon on July 3. *N. Y. Times*, July 3, 1940, p. 4.
- 28 FINLAND—SOVIET RUSSIA. Signed trade treaty at Moscow embodying most-favored-nation principle. *N. Y. Times*, June 29, 1940, p. 6.

- 28 FRENCH RECOGNITION. British Government recognized Gen. Charles de Gaulle as leader of group to maintain French resistance. *N. Y. Times*, June 29, 1940, p. 9; *London Times*, June 29, 1940, p. 6.
- 28 GERMAN WHITE BOOK. Fifth book concerns invasions of the Low Countries. *N. Y. Times*, June 29, 1940, p. 8; *B. I. N.*, July 17, 1940, p. 889.
- 29 ALIEN REGISTRATION BILL. Signed by President Roosevelt. *N. Y. Times*, June 30, 1940, p. 5. Text: *Pub. Res.* No. 670. 76th Cong., 3d Sess. H. R. 5138.
- 29 ARGENTINA—UNITED STATES. Signed agreement at Washington for detail of military aviation instructors to Argentina, superseding the agreement of Sept. 12, 1939. *D. S. B.*, June 29, 1940, p. 719. Text: *Ex. Agr. Ser.*, No. 175.
- 30 FRANCO-GERMAN ARMISTICE COMMISSION. 1st session held at Wiesbaden. *N. Y. Times*, July 1, 1940, p. 3; *London Times*, July 1 and 3, 1940, p. 3.

July, 1940

- 1 EMBASSIES. German Foreign Office advised United States Embassy at Berlin to discontinue all diplomatic missions in Norway, Belgium, Luxemburg and The Netherlands by July 15. *N. Y. Times*, July 2, 1940, p. 2.
- 1 RUMANIA. Council of Ministers renounced Franco-British guarantee of territorial integrity pledged on April 13, 1939. *N. Y. Times*, July 2, 1940, p. 1.
- 2-11 FRANCE. The government was established at Vichy July 2. *N. Y. Times*, July 3, 1940, p. 3. The French Parliament voted July 9 to end its existence. *N. Y. Times*, July 10, 1940, p. 1. Marshal Pétain assumed full powers as head of the state on July 11. *N. Y. Times*, July 12, 1940, p. 1.
- 2/26 EXPORTS IN NATIONAL DEFENSE. Presidential proclamation set up a licensing system to control export of munitions, materials and machinery vital to national defense. Text: *N. Y. Times*, July 3, 1940, p. 11; *D. S. B.*, July 6, 1940, pp. 11-13. Presidential proclamation of July 26 related to administration of Sec. 6 of the National Defense Act of July 2. *D. S. B.*, July 27, 1940, p. 49.
- 5 GERMANY—SOVIET RUSSIA. Agreement to reopen consulates at three centers in each country. *N. Y. Times*, July 6, 1940, p. 3; *B. I. N.*, July 13, 1940, p. 920.
- 5 GERMANY—SWEDEN. Arrangement concluded giving Germany the right to move unarmed soldiers and supplies of all kinds over Swedish railways to Norway. *B. I. N.*, July 17, 1940, p. 913.
- 5 GERMANY—UNITED STATES. Secretary Hull issued statement summarizing United States note of June 17 and German reply of July 1, concerning interference in countries of the Western Hemisphere. *D. S. B.*, July 6, 1940, pp. 3-4; *N. Y. Times*, July 6, 1940, p. 6.
- 5 LITHUANIA—VATICAN. Announcement made at Rome of Lithuania's renunciation of concordat with the Vatican. *N. Y. Times*, July 6, 1940, p. 3.
- 5/17 FRANCE—GREAT BRITAIN. The French Government of Marshal Pétain broke off diplomatic relations with Great Britain as a result of the British attack on French warships at Oran, Algeria. *N. Y. Times*, July 6, 1940, p. 1. On July 17 it was agreed to exchange agents who will remain to liquidate the economic and commercial affairs outstanding between the countries. *N. Y. Times*, July 18, 1940, p. 13.
- 6 GERMANY—GREECE. Signed economic agreement to fix exchange rate and to increase export and import quotas as from Sept. 1. *N. Y. Times*, July 7, 1940, p. 18; *B. I. N.*, July 17, 1940, p. 899.

- 8 MARTINIQUE. Announcement made in Washington that Great Britain has assured the United States no blockade of Martinique, W. I., is being maintained. *N. Y. Times*, July 9, 1940, p. 6.
- 11 COMMERCIAL TREATIES AND AGREEMENTS. Division of Commercial Treaties and Agreements established in the Department of State by a departmental order. Text: *D. S. B.*, July 6, 1940, p. 16.
- 12 ETHIOPIAN RECOGNITION. Reversing its action of November, 1938, Great Britain recognized as a full ally the Ethiopia of Emperor Haile Selassie. *N. Y. Times*, July 13, 1940, p. 2.
- 13 FRENCH FRANC. The Pétain Government decided to detach the franc from the pound sterling and to peg it to the United States dollar, thus ending the tripartite monetary agreement of October, 1936. *N. Y. Times*, July 13, 1940, p. 25.
- 15 TRANSFER OF BALTIC STATES CREDITS. President Roosevelt extended the monetary freeing order to Baltic States (Latvia, Lithuania and Estonia). *N. Y. Times*, July 16, 1940, p. 12; *D. S. B.*, July 20, 1940, p. 33.
- 15/26 LEAGUE OF NATIONS. Princeton University invited the League to transfer its non-political units for the duration of the war. *N. Y. Times*, July 16, 1940, p. 18. Sec.-Gen. Joseph C. Avenol resigned July 26. *N. Y. Times*, July 27, 1940, p. 2; *London Times*, July 27, 1940, p. 4. The Secretariat will be directed by a committee of three high officials.
- 16 CHILE—SPAIN. Spain severed diplomatic relations with Chile. *N. Y. Times*, July 17, 1940, p. 11; *D. S. B.*, July 27, 1940, p. 48; *B. I. N.*, July 27, 1940, p. 981.
- 17 EGYPT—GREAT BRITAIN. Signed agreement in Cairo for abolition of the *Caisse de la Dette Publique*, and providing Egypt alone would control the debt outstanding under loans raised during the régime of Ismail Pasha. *B. I. N.*, July 27, 1940, p. 958.
- 18 GREAT BRITAIN—JAPAN. Terms of temporary agreement for stoppage of war supplies to China through Burma and Hongkong announced by the British Prime Minister. *London Times*, July 19, 1940, p. 4.
- 20 GERMANY—HUNGARY. Signed trade agreement, to run for one year. *B. I. N.*, July 27, 1940, p. 968.
- 21 CZECHOSLOVAKIAN RECOGNITION. Provisional Czechoslovak Government recognized by Great Britain. *Central European Observer* (London), Aug. 1, 1940, p. 113. Members of the government: p. 121.
- 21/August 5 BALTIC STATES—SOVIET RUSSIA. Estonian, Latvian and Lithuanian national assemblies voted unanimously to join the U.S.S.R. *B. I. N.*, July 27, 1940, pp. 959, 976-977. Summary of resolutions adopted by the assemblies on July 21: *N. Y. Times*, July 22, 1940, p. 1. Estonia was accepted into the Soviet Union on Aug. 5. *London Times*, Aug. 7, 1940, p. 3.
- 29/August 13 WAR GUILT TRIALS. The French Cabinet adopted a law to create a seven-judge Supreme Court of Justice which is expected to try several former ministers on charges of bringing about French military collapse. *N. Y. Times*, July 30, 1940, p. 7; *London Times*, July 30, 1940, p. 3. Trials opened Aug. 13 at Riom. *London Times*, Aug. 14, 1940, p. 3.
- 30 PORTUGAL—SPAIN. Signed protocol to treaty of friendship and non-aggression of March 18, 1939, in case of threatened attack. *C. S. Monitor*, July 30, 1940, p. 4; *London Times*, July 31, 1940, p. 3.

- 31 AVIATION GASOLINE EXPORT. Banned by United States, except to countries in the Western Hemisphere. *N. Y. Times*, Aug. 1, 1940, p. 1; *D. S. B.*, Aug. 3, 1940, p. 94.
- 31 MOST-FAVORED-NATION CLAUSE. Treaties and agreements of the United States containing the clause. *D. S. B.*, Aug. 3, 1940, pp. 96-98.
- 31 PERU—UNITED STATES. Signed agreements providing for renewal by the United States of a Naval Mission and for the furnishing of an Aviation Mission to Peru. *D. S. B.*, Aug. 3, 1940, p. 98.

August, 1940

- 5 GREAT BRITAIN—POLAND. Signed agreement in London reaffirming political and military coöperation. *London Times*, Aug. 8, 1940, p. 3.
- 6 SOVIET RUSSIA—UNITED STATES. Renewed by exchange of notes at Moscow, the annual trade agreement. Text: *D. S. B.*, Aug. 10, 1940, pp. 105-107; *London Times*, Aug. 7, 1940, p. 3.
- 8 CANADA—UNITED STATES. President Roosevelt signed proclamation providing for the suspension of tonnage and import duties within the United States with respect to vessels of Canada and the produce, manufactures, or merchandise imported in said vessels into the United States from Canada or from any other foreign country. *D. S. B.*, Aug. 17, 1940, p. 116.
- 9 GREAT BRITAIN—UNITED STATES. Presidential proclamation amended certain regulations included in the terms of the Convention for the Protection of Migratory Birds, signed Aug. 16, 1916. *D. S. B.*, Aug. 17, 1940, p. 116.
- 9 MEXICO—UNITED STATES. Presidential proclamation amended certain regulations included in the terms of the Convention for the Protection of Migratory Birds and Game Mammals, signed Feb. 7, 1936. *D. S. B.*, Aug. 17, 1940, pp. 116-117.
- 14/15 LUXEMBURG. Constitution declared void by Dr. Simon, German civil administrator. Use of terms "Grand Duchy" and "State of Luxemburg" prohibited in official documents. *N. Y. Times*, Aug. 15, 1940, p. 4. Luxemburg, incorporated within the German Reich's customs borders. *N. Y. Times*, Aug. 16, 1940, p. 2.

INTERNATIONAL CONVENTIONS

AIR TRAFFIC. London, March 1, 1939.

Ratifications:

Greece. March 27, 1940.

Turkey. April 5, 1940. *D. S. B.*, May 25, 1940, p. 587.

COLLECTION ACCOUNTS. Buenos Aires, May 23, 1939.

Ratifications:

Japan. June 15, 1940.

Paraguay. *D. S. B.*, July 27, 1940, p. 62.

LETTERS, ETC., OF DECLARED VALUE. Buenos Aires, May 23, 1939.

Ratifications:

Japan. June 15, 1940.

Paraguay. *D. S. B.*, July 27, 1940, p. 62.

MONEY ORDERS. Buenos Aires, May 23, 1939.

Ratifications:

Costa Rica. July 6, 1940.

Japan. June 15, 1940.

Paraguay. *D. S. B.*, July 27, 1940, p. 62.

NATIONALITY CONVENTION. The Hague, April 12, 1930.

Application to: Burma (as of April 1, 1937). *D. S. B.*, June 1, 1940, p. 615.

NATIONALITY. Protocol on Military Obligations in Cases of Double Nationality. The Hague, April 12, 1930.

Application to: Burma (as of April 1, 1937). *D. S. B.*, June 1, 1940, p. 615.

NATIONALITY. Protocol on Statelessness. The Hague, April 12, 1930.

Application to: Burma (as of April 1, 1937). *D. S. B.*, June 1, 1940, p. 615.

NATIONALITY. Special Protocol on Statelessness. The Hague, April 12, 1930.

Application to: Burma (as of April 1, 1937). *D. S. B.*, June 1, 1940, p. 615.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.

Adhesion deposited: French Morocco. May 7, 1940. *D. S. B.*, June 22, 1940, p. 699.

PARCEL POST. Buenos Aires, May 23, 1939.

Ratifications:

Costa Rica. July 6, 1940.

Japan. June 15, 1940.

Paraguay. *D. S. B.*, July 27, 1940, p. 62.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.

Renewal: Thailand (for 10 years). May 3, 1940. *D. S. B.*, June 22, 1940, p. 699.

POSTAL CHECKS. Buenos Aires, May 23, 1939.

Ratifications:

Japan. June 15, 1940.

Paraguay. *D. S. B.*, July 27, 1940, p. 62.

POSTAL SUBSCRIPTIONS TO NEWSPAPERS. Buenos Aires, May 23, 1939.

Ratification: Paraguay. *D. S. B.*, July 27, 1940, p. 62.

POWERS OF ATTORNEY. Protocol. Washington, Feb. 17, 1940.

Signatures:

Colombia (*ad referendum*). May 25, 1940.

Nicaragua. May 27, 1940. *D. S. B.*, June 8, 1940, p. 632.

El Salvador. May 21, 1940. *D. S. B.*, June 1, 1940, p. 615.

REFUGEES (INTERNATIONAL STATUS). Geneva, Oct. 28, 1933.

Ratifications: British dependencies. May 30, 1940. *D. S. B.*, July 20, 1940, p. 38.

REFUGEES FROM GERMANY. Geneva, Feb. 10, 1938.

Ratifications: British dependencies. May 30, 1940. *D. S. B.*, July 20, 1940, p. 38.

REFUGEES FROM GERMANY. Additional Protocol. Geneva, Sept. 14, 1939.

Ratifications: British dependencies. May 30, 1940. *D. S. B.*, July 20, 1940, p. 38.

REFUGEES FROM GERMANY. Provisional Agreement and Final Act. Geneva, July 4, 1936.

Ratifications: British dependencies. May 30, 1940. *D. S. B.*, July 20, 1940, p. 38.

RELIEF UNION. Geneva, July 12, 1927.

Application to: Burma (as of April 1, 1937). *D. S. B.*, July 13, 1940, p. 27.

SANITARY CONVENTION. Paris, June 21, 1926. Modification. Paris, Oct. 31, 1938.

Ratification deposited: Afghanistan. April 8, 1940. *D. S. B.*, June 8, 1940, p. 632.

STATISTICS OF WAGES AND HOURS OF WORK. Geneva, June 20, 1938.

Ratifications deposited:

The Netherlands. March 9, 1940. *I. L. O. Month by Month*, Jan./March, 1940, p. 22;

D. S. B., April 20, 1940, p. 425.

- New Zealand (with reservation). Jan. 18, 1940. *D. S. B.*, March 2, 1940, p. 275;
L. N. O. J., Jan./March, 1940, p. 10.
- Norway. March 29, 1940. *D. S. B.*, May 4, 1940, p. 482.
- TELEGRAPH REGULATIONS AND PROTOCOL. Madrid, Dec. 9, 1932.
Approval: Guatemala (with reservation). April 28, 1940. *D. S. B.*, July 6, 1940, p. 19.
- UNIVERSAL POSTAL CONVENTION. Buenos Aires, May 23, 1939.
Ratifications:
Costa Rica. July 6, 1940.
Japan. June 15, 1940.
Paraguay. *D. S. B.*, July 27, 1940, p. 62.
- WHALING. Final Act. London, June 8, 1937. Protocol of Amendment. June 24, 1938.
Ratification deposited: Ireland. June 20, 1940. *D. S. B.*, Aug. 17, 1940, p. 117.
- WORKMEN'S COMPENSATION FOR ACCIDENTS. Geneva, June 10, 1925.
Ratification deposited: Iraq. April 30, 1940. *D. S. B.*, June 22, 1940, p. 701.

DOROTHY R. DART

✓
UNITED STATES ATTORNEY GENERAL

OPINION ON EXCHANGE OF OVER-AGE DESTROYERS FOR NAVAL AND AIR BASES

OFFICE OF THE ATTORNEY GENERAL

Washington, D. C., August 27, 1940.

The PRESIDENT,

The White House.

MY DEAR MR. PRESIDENT: In accordance with your request I have considered your constitutional and statutory authority to proceed by executive agreement with the British Government immediately to acquire for the United States certain off-shore naval and air bases in the Atlantic Ocean without awaiting the inevitable delays which would accompany the conclusion of a formal treaty.

The essential characteristics of the proposal are:

(a) The United States to acquire rights for immediate establishment and use of naval and air bases in Newfoundland, Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, and British Guiana; such rights to endure for a period of 99 years and to include adequate provisions for access to, and defense of, such bases and appropriate provisions for their control.

(b) In consideration it is proposed to transfer to Great Britain the title and possession of certain over-age ships and obsolescent military materials now the property of the United States, and certain other small patrol boats which though nearly completed are already obsolescent.

(c) Upon such transfer all obligation of the United States is discharged. The acquisition consists only of rights, which the United States may exercise or not at its option, and if exercised may abandon without consent. The privilege of maintaining such bases is subject only to limitations necessary to reconcile United States use with the sovereignty retained by Great Britain. Our Government assumes no responsibility for civil administration of any territory. It makes no promise to erect structures, or maintain forces at any point. It undertakes no defense of the possessions of any country. In short it acquires optional bases which may be developed as Congress appropriates funds therefor, but the United States does not assume any continuing or future obligation, commitment, or alliance.

The questions of constitutional and statutory authority, with which alone I am concerned, seem to be these:

First. May such an acquisition be concluded by the President under an executive agreement or must it be negotiated as a treaty subject to ratification by the Senate?

Second. Does authority exist in the President to alienate the title to such ships and obsolescent materials, and if so, on what conditions?

Third. Do the statutes of the United States limit the right to deliver

the so-called mosquito boats now under construction or the over-age destroyers by reason of the belligerent status of Great Britain?

I

There is, of course, no doubt, concerning the authority of the President to negotiate with the British Government for the proposed exchange. The only questions that might be raised in connection therewith are (1) whether the arrangement must be put in the form of a treaty and await ratification by the Senate or (2) whether there must be additional legislation by the Congress. Ordinarily (and assuming the absence of enabling legislation) the question whether such an agreement can be concluded under Presidential authority or whether it must await ratification by a two-thirds vote of the United States Senate involves consideration of two powers which the Constitution vests in the President.

One of these is the power of the Commander in Chief of the Army and Navy of the United States, which is conferred upon the President by the Constitution but is not defined or limited. Happily, there has been little occasion in our history for the interpretation of the powers of the President as Commander in Chief of the Army and Navy. I do not find it necessary to rest upon that power alone to sustain the present proposal. But it will hardly be open to controversy that the vesting of such a function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations for the utilization of the naval and air weapons of the United States at their highest efficiency in our defense. It seems equally beyond doubt that present world conditions forbid him to risk any delay that is constitutionally avoidable.

The second power to be considered is that control of foreign relations which the Constitution vests in the President as a part of the executive function. The nature and extent of this power has recently been explicitly and authoritatively defined by Mr. Justice Sutherland, writing for the Supreme Court. In 1936, in *United States v. Curtiss-Wright Export Corp., et al.* (299 U. S. 304), he said:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary, and exclusive power of the President as the sole organ of the Federal Government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic

affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

The President's power over foreign relations while "delicate, plenary, and exclusive" is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress. Such Presidential arrangements are customarily submitted for ratification by a two-thirds vote of the Senate before the future legislative power of the country is committed. However, the acquisitions which you are proposing to accept are without express or implied promises on the part of the United States to be performed in the future. The consideration, which we later discuss, is completed upon transfer of the specified items. The executive agreement obtains an opportunity to establish naval and air bases for the protection of our coast line but it imposes no obligation upon the Congress to appropriate money to improve the opportunity. It is not necessary for the Senate to ratify an opportunity that entails no obligation.

There are precedents which might be cited, but not all strictly pertinent. The proposition falls far short in magnitude of the acquisition by President Jefferson of the Louisiana Territory from a belligerent during a European war, the Congress later appropriating the consideration and the Senate later ratifying a treaty embodying the agreement.

I am also reminded that in 1850, Secretary of State Daniel Webster acquired Horse Shoe Reef, at the entrance of Buffalo Harbor, upon condition that the United States would engage to erect a lighthouse and maintain a light but would erect no fortification thereon. This was done without awaiting legislative authority. Subsequently the Congress made appropriations for the lighthouse, which was erected in 1856. Malloy, *Treaties and Conventions* (Vol. 1, p. 663).

It is not believed, however, that it is necessary here to rely exclusively upon your constitutional power. As pointed out hereinafter (in discussing the second question), I think there is also ample statutory authority to support the acquisition of these bases, and the precedents perhaps most nearly in point are the numerous acquisitions of rights in foreign countries for sites of diplomatic and consular establishments—perhaps also the trade agreements recently negotiated under statutory authority and the acquisition in 1903 of the coaling and naval stations and rights in Cuba under the Act of March 2, 1901 (H. 803, 31 Stat. 895, 898). In the last-mentioned case the agreement was subsequently embodied in a treaty but it was only one of a number of undertakings, some clearly of a nature to be dealt with ordinarily by treaty, and the statute had required "that by way of further assurance

the Government of Cuba will embody the foregoing provisions in a permanent treaty with the United States."

The transaction now proposed represents only an exchange with no statutory requirement for the embodiment thereof in any treaty and involving no promises or undertakings by the United States that might raise the question of the propriety of incorporation in a treaty. I therefore advise that acquisition by executive agreement of the rights proposed to be conveyed to the United States by Great Britain will not require ratification by the Senate.

II

The right of the President to dispose of vessels of the Navy and unneeded naval material finds clear recognition in at least two enactments of the Congress and a decision of the Supreme Court—and any who assert that the authority does not exist must assume the burden of establishing that both the Congress and the Supreme Court meant something less than the clear import of seemingly plain language.

By Section 5 of the Act of March 3, 1883 (C. 141; 22 Stat. 582, 599–600 (U. S. C., Title 34, Sec. 492)), the Congress placed restrictions upon the methods to be followed by the Secretary of the Navy in disposing of naval vessels, which have been found unfit for further use and stricken from the naval registry, but by the last clause of the section recognized and confirmed such a right in the President free from such limitations. It provides:

But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, *unless the President of the United States shall otherwise direct in writing.* [Italics supplied.]

In *Levinson v. United States* (258 U. S. 198, 201), the Supreme Court said of this statute that "the power of the President to direct a departure from the statute is not confined to a sale for less than the appraised value but extends to the manner of the sale," and that "the word 'unless' qualifies both the requirements of the concluding clause."

So far as concerns this statute, in my opinion it leaves the President as Commander in Chief of the Navy free to make such disposition of naval vessels as he finds necessary in the public interest, and I find nothing that would indicate that the Congress has tried to limit the President's plenary powers to vessels already stricken from the naval registry. The President, of course, would exercise his powers only under the high sense of responsibility which follows his rank as Commander in Chief of his nation's defense forces.

Furthermore, I find in no other statute or in the decisions any attempted limitations upon the plenary powers of the President as Commander in Chief of the Army and Navy and as the head of the state in its relations with foreign countries to enter into the proposed arrangements for the transfer to the

British Government of certain over-age destroyers and obsolescent military material except the limitations recently imposed by Section 14 (a) of the Act of June 28, 1940 (Public, No. 671). This section, it will be noted, clearly recognizes the authority to make transfers and seeks only to impose certain restrictions thereon. The section reads as follows:

SEC. 14. (a) Notwithstanding the provision of any other law, no military or naval weapon, ship, boat, aircraft, munitions, supplies, or equipment, to which the United States has title, in whole or in part, or which have been contracted for, shall hereafter be transferred, exchanged, sold, or otherwise disposed of in any manner whatsoever unless the Chief of Naval Operations in the case of naval material, and the Chief of Staff of the Army in the case of military material, shall first certify that such material is not essential to the defense of the United States.

Thus to prohibit action by the constitutionally created commander in chief except upon authorization of a statutory officer subordinate in rank is of questionable constitutionality. However, since the statute requires certification only of matters as to which you would wish, irrespective of the statute, to be satisfied, and as the legislative history of the section indicates that no arbitrary restriction is intended, it seems unnecessary to raise the question of constitutionality which such a provision would otherwise invite.

I am informed that the destroyers involved here are the survivors of a fleet of over 100 built at about the same time and under the same design. During the year 1930, 58 of these were decommissioned with a view toward scrapping and a corresponding number were recommissioned as replacements. Usable material and equipment from the 58 vessels removed from the service were transferred to the recommissioned vessels to recondition and modernize them, and other usable material and equipment were removed and the vessels stripped. They were then stricken from the *Navy Register*, and 50 of them were sold as scrap for prices ranging from \$5,260 to \$6,800 per vessel, and the remaining 8 were used for such purposes as target vessels, experimental construction tests, and temporary barracks. The surviving destroyers now under consideration have been reconditioned and are in service, but all of them are over age, most of them by several years.

In construing this statute in its application to such a situation it is important to note that this subsection as originally proposed in the Senate bill provided that the appropriate staff officer shall first certify that "such material is not essential to and cannot be used in the defense of the United States." Senator Barkley and others objected to the subsection as so worded on the ground that it would prevent the release and exchange of surplus or used planes and other supplies for sale to the British and that it would consequently nullify the provisions of the bill (see Sec. 1 of the Act of July 2, 1940, H. R. 9850, Public, No. 703) which the Senate had passed several days earlier for that very purpose. Although Senator Walsh stated that he did not think the proposed subsection had that effect, he agreed to strike out the words "and cannot be used." Senator Barkley observed that

he thought the modified language provided "a much more elastic term." Senator Walsh further stated that he would bear in mind in conference the views of Senator Barkley and others, and that he had "no desire or purpose to go beyond the present law, but to have some certificate filed as to whether the property is surplus or not" (*Congressional Record*, June 21, 1940, pp. 13370-13371).

In view of this legislative history it is clear that the Congress did not intend to prevent the certification for transfer, exchange, sale, or disposition of property merely because it is still used or usable or of possible value for future use. The statute does not contemplate mere transactions in scrap, yet exchange or sale except as scrap would hardly be possible if confined to material whose usefulness is entirely gone. It need only be certified as not essential, and "essential," usually the equivalent of vital or indispensable, falls far short of "used" or "usable."

Moreover, as has been indicated, the congressional authorization is not merely of a sale, which might imply only a cash transaction. It also authorizes equipment to be "transferred," "exchanged," or "otherwise disposed of"; and in connection with material of this kind for which there is no open market value is never absolute but only relative—and chiefly related to what may be had in exchange or replacement.

In view of the character of the transactions contemplated, as well as the legislative history, the conclusion is inescapable that the Congress has not sought by Section 14 (a) to impose an arbitrary limitation upon the judgment of the highest staff officers as to whether a transfer, exchange, or other disposition of specific items would impair our essential defenses. Specific items must be weighed in relation to our total defense position before and after an exchange or disposition. Any other construction would be a virtual prohibition of any sale, exchange, or disposition of material or supplies so long as they were capable of use, however ineffective, and such a prohibition obviously was not, and was not intended to be, written into the law.

It is my opinion that in proceeding under Section 14 (a) appropriate staff officers may and should consider remaining useful life, strategic importance, obsolescence, and all other factors affecting defense value, not only with respect to what the Government of the United States gives up in any exchange or transfer, but also with respect to what the Government receives. In this situation good business sense is good legal sense.

I therefore advise that the appropriate staff officers may, and should, certify under Section 14 (a) that ships and material involved in a sale or exchange are not essential to the defense of the United States if in their judgment the consummation of the transaction does not impair or weaken the total defense of the United States, and certainly so where the consummation of the arrangement will strengthen the total defensive position of the nation.

With specific reference to the proposed agreement with the Government of

Great Britain for the acquisition of naval and air bases, it is my opinion that the Chief of Naval Operations may, and should, certify under Section 14 (a) that the destroyers involved are not essential to the defense of the United States if in his judgment the exchange of such destroyers for such naval and air bases will strengthen rather than impair the total defense of the United States.

I have previously indicated that in my opinion there is statutory authority for the acquisition of the naval and air bases in exchange for the vessels and material. The question was not more fully discussed at that point because dependent upon the statutes above treated and which required consideration in this section of the opinion. It is to be borne in mind that these statutes clearly recognize and deal with the authority to make dispositions by sale, transfer, exchange, or otherwise; that they do not impose any limitations concerning individuals, corporations, or governments to which such dispositions may be made; and that they do not specify or limit in any manner the consideration which may enter into an exchange. There is no reason whatever for holding that sales may not be made to or exchanges made with a foreign government or that in such a case a treaty is contemplated. This is emphasized when we consider that the transactions in some cases may be quite unimportant, perhaps only dispositions of scrap, and that a domestic buyer (unless restrained by some authorized contract or embargo) would be quite free to dispose of his purchase as he pleased. Furthermore, Section 14 (a) of the Act of June 28, 1940, *supra*, was enacted by the Congress in full contemplation of transfers for ultimate delivery to foreign belligerent nations. Possibly it may be said that the authority for exchange of naval vessels and material presupposes the acquisition of something of value to the Navy or, at least, to the national defense. Certainly I can imply no narrower limitation when the law is wholly silent in this respect. Assuming that there is, however, at least the limitation which I have mentioned, it is fully met in the acquisition of rights to maintain needed bases. And if, as I hold, the statute law authorizes the exchange of vessels and material for other vessels and material or, equally, for the right to establish bases, it is an inescapable corollary that the statute law also authorizes the acquisition of the ships or material or bases which form the consideration for the exchange.

Whether the statutes of the United States prevent the dispatch to Great Britain, a belligerent Power, of the so-called "mosquito boats" now under construction or the over-age destroyers depends upon the interpretation to be placed on Section 3 of title V of the Act of June 15, 1917 (C. 30, 40 Stat. 217, 222). This section reads:

During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel, built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent

nation, or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.

This section must be read in the light of Section 2 of the same act and the rules of international law which the Congress states that it was its intention to implement (H. Rept. No. 30, 65th Cong., 1st sess., p. 9). So read, it is clear that it is inapplicable to vessels, like the over-age destroyers, which were not built, armed, equipped as, or converted into, vessels of war with the intent that they should enter the service of a belligerent. If the section were not so construed, it would render meaningless Section 2 of the act which authorizes the President to detain any armed vessel until he is satisfied that it will not engage in hostile operations before it reaches a neutral or belligerent port. The two sections are intelligible and reconcilable only if read in light of the traditional rules of international law. These are clearly stated by Oppenheim in his work on *International Law* (5th ed., Vol. 2, Sec. 334, pp. 574-576):

Whereas a neutral is in no wise obliged by his duty of impartiality to prevent his subjects from selling armed vessels to the belligerents, such armed vessels being merely contraband of war, a neutral is bound to employ the means at his disposal to prevent his subjects from building, fitting out, or arming, to the order of either belligerent, vessels intended to be used as men-of-war, and to prevent the departure from his jurisdiction of any vessel which, by order of either belligerent, has been adapted to warlike use. The difference between selling armed vessels to belligerents and building them to order is usually defined in the following way:

An armed ship, being contraband of war, is in nowise different from other kinds of contraband, provided that she is not manned in a neutral port, so that she can commit hostilities at once after having reached the open sea. A subject of a neutral who builds an armed ship, or arms a merchantman, not to the order of a belligerent, but intending to sell her to a belligerent, does not differ from a manufacturer of arms who intends to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, and to deliver them to belligerents, either in a neutral port or in a belligerent port. . . .

On the other hand, if a subject of a neutral builds armed ships *to the order of a belligerent*, he prepares the means of naval operations, since the ships, on sailing outside the neutral territorial waters and taking in a crew and ammunition, can at once commit hostilities. Thus, through the carrying out of the order of the belligerent, the neutral territory has been made the base of naval operations; and as the duty of impartiality includes an obligation to prevent either belligerent from making neutral territory the base of military or naval operations, a neutral violates his neutrality by not preventing his subjects from carrying out an order of a belligerent for the building and fitting out of men-of-war. This distinction, although of course logically correct, is hair-splitting. But as, according to the present law, neutral states need not prevent their subjects from supplying arms and ammunition to belligerents, it will probably continue to be drawn.

Viewed in the light of the above, I am of the opinion that this statute does prohibit the release and transfer to the British Government of the so-called mosquito boats now under construction for the United States Navy. If these boats were released to the British Government, it would be legally impossible for that Government to take them out of this country after their completion, since to the extent of such completion at least they would have been built, armed, or equipped with the intent, or with reasonable cause to believe, that they would enter the service of a belligerent after being sent out of the jurisdiction of the United States.

This will not be true, however, with respect to the over-age destroyers, since they were clearly not built, armed, or equipped with any such intent or with reasonable cause to believe that they would ever enter the service of a belligerent.

In this connection it has been noted that during the war between Russia and Japan in 1904 and 1905, the German Government permitted the sale to Russia of torpedo boats and also of ocean liners belonging to its auxiliary navy. See Wheaton's *International Law*, 6th ed. (Keith), Vol. 2, p. 977.

IV

Accordingly, you are respectfully advised:

(a) That the proposed arrangement may be concluded as an executive agreement, effective without awaiting ratification.

(b) That there is Presidential power to transfer title and possession of the proposed considerations upon certification by appropriate staff officers.

(c) That the dispatch of the so-called "mosquito boats" would constitute a violation of the statute law of the United States, but with that exception there is no legal obstacle to the consummation of the transaction, in accordance, of course, with the applicable provisions of the Neutrality Act as to delivery.

Respectfully submitted.

ROBERT H. JACKSON
Attorney General

SUDDEN & CHRISTENSON, INC. v. UNITED STATES

IN THE MATTER OF THE CLAIM IN BEHALF OF JOHN A. HOOPER, SUDDEN & CHRISTENSON, A CORPORATION, G. W. MCNEAR, INC., EMIL T. KRUSE, GILBERT LOKEN, AND EDWARD KRUSE, ALL CITIZENS OF THE UNITED STATES AND OF THE STATE OF CALIFORNIA AND OWNERS OF THE AMERICAN STEAMSHIP "EDNA," FOR ALLEGED LOSS AND DAMAGE SUFFERED BECAUSE OF THE SEIZURE AND REQUISITION OF SAID STEAMSHIP BY THE BRITISH GOVERNMENT AND THE USE THEREOF BY SAID BRITISH GOVERNMENT

*Award rendered December 22, 1934*¹

A registered American vessel was captured by a British cruiser on Jan. 27, 1916, and taken into a British prize court. Pending prize proceedings, the vessel was requisitioned by the British Government and used in its service for over three years. It was released on May 8, 1919, after judgment by the British prize court, rendered April 3, 1919, which returned the vessel to its owners, but denied damages or other compensation on the ground that there was probable cause for the seizure.

Subsequently the American owners asserted a claim against the United States pursuant to the agreement of May 19, 1927, by which the United States assumed liability for certain claims of American citizens against the British Government. Negotiations to effect a settlement were unsuccessful, and it was agreed to submit the matter to arbitration by the Honorable John C. Knox, United States District Judge of New York.

The findings of the British prize court as to probable cause for the capture were upheld by the arbitrator. He also found that both the claimants and the Crown had contributed to the long delay in the trial of the case in the British courts, but that the use of the vessel by Great Britain for a period that was longer than her necessities and her rights as a belligerent reasonably required without compensation in any form was essentially unjust.

Held, that the claimants are entitled, in the nature of demurrage, to an award of the amount they would have earned as charter hire during the last year of detention at the rate paid in London as requisition hire by the British Government for steamers of the same size and class.

The question of interest on the award was referred to Congress with the suggestion that, if allowed, it be calculated at not to exceed 4 per cent from May 19, 1927, the date of the agreement with Great Britain under which the United States assumed liability. (See Act of Congress authorizing payment of claim, *post*, p. 751.)

Appearances: Legal Adviser to the Department of State (by J. A. Metzger and J. B. Matre, Esqs.); Harvey D. Jacob, Esq., counsel for claimants.

John C. Knox, arbitrator.

Prior to March 7, 1914, the steamship *Edna*, with which this inquiry is concerned, was known as the "*Jason*." She had Norwegian ownership and registry. By charter agreement she came under the management and control of a national of Germany named Friedrich Jebsen. He, it seems, was a reserve officer in the naval forces of that country. At his instance, the vessel was put in trade between Pacific ports of the United States and Mexico.

On or about the date above mentioned, the *Jason*, for a consideration of £16,000, passed to the ownership of a Mexican corporation named "Lloyd Mexicano, S. A.," dominated by Jebsen. Thereupon, the Mexican Consul General at San Francisco, acting under authority of his government, gave the ship a provisional Mexican registry, and she was renamed *Mazatlan*. The status thus acquired, with exceptions hereafter to be noted, continued

¹ H. R. Rept. No. 1358, 74th Cong., 1st Sess.

until near the end of 1915, when the ship was purchased by present claimants, and given the name *Edna*.

During the vessel's ownership by the Mexican corporation, she had an eventful career, and acquired a widespread reputation. Factors contributing thereto were internal strife in Mexico, strained relations between that country and the United States, and finally, the Great War that came upon the world in August of 1914. Under the name *Mazatlan* the vessel made four voyages up and down the Pacific coast. The first was of no consequence. The second covered the period running from May 14 to August 3, 1914. In June of that year, and due, no doubt, to a desire to avoid complications arising from disturbances between the rival and contending political factions in Mexico, effort was made to change the ship's registry.

The laws of this country were such that the vessel, in her then ownership, could not receive authorization to fly the American flag. Resort was had to the German consul at San Pedro, Calif. Through sanction of that official, doubtless solicited and obtained by Jebsen, the ship procured upon June 20 a document that purported to permit her to carry the flag of Germany. Thereupon the name "La Paz" which had indicated the Mexican port of registry, was painted from her stern, and Hamburg was substituted in its place. Under these pretenses, the vessel completed her voyage and returned to San Francisco about August 3, 1914. Outbreak of war between Great Britain and Germany was highly imminent. In the light of what was about to occur, further use of the German flag was inadvisable. It was, therefore, supplanted by that of Mexico, and La Paz, instead of Hamburg, again appeared on the ship's stern. Possibly this change had not been made before war actually was declared.

For some days following these changes of outward appearance, the vessel lay at anchorage in San Francisco Bay. On August 14, she prepared to receive cargo which subsequently came aboard. It included 500 tons of coal, consigned to merchants located at Guaymas. At this point, observation should be made that a young man named Smith, who was trained in wireless communication, was employed on board the ship. He, together with other members of the crew, understood the coal to be intended for use by the German cruiser *Leipsig*, then operating in the Pacific.

Meanwhile, various other persons entertained suspicions as to the intended destination of the coal on board the *Mazatlan*, and these came to the notice of American and British officials in San Francisco. As a result, the ship was refused clearance until she should furnish bond that the coal would not be delivered to any German man-of-war that had coaled at an American port within the preceding three months. After some delay, such security was posted, and the *Mazatlan* got to sea on August 23. She directed her course for San Pedro. On arrival there, Jebsen and a Captain Zur Helle, accompanied by two women, and a wireless operator, named Traub, together with a German naval reservist, joined the ship. She also took on board several

heavy boxes, some baggage, and some private boxes. Some of these, it was subsequently indicated, contained gunsights and other material likely to be found useful by a man-of-war.

After remaining seven hours at San Pedro, the *Mazatlan* again put to sea. When well out, Jebson sought to get into communication with the *Leipsig*. He was frustrated from doing so by Smith, who manipulated his apparatus to prevent the message. The next day, the vessel reached Ensenada, arriving early in the morning and departing in the evening. When again under way, and at 9:20 p.m., the wireless call of the *Leipsig* was received. The second day thereafter, the *Mazatlan* dropped anchor at Bellenas Bay within 200 yards of the German cruiser. Jebson, Zur Helle, the reservist, and Traub boarded her. They took with them the several boxes, packages, and some mail. After about four hours, Jebson, Traub, and Zur Helle returned to the *Mazatlan*. She shortly left and, in due course, made La Paz. She then proceeded to Guaymas, where she arrived on September 2. She there discharged her coal cargo into lighters, and it thereafter went into the bunkers of the *Leipsig*. While at Guaymas, Smith, the wireless operator, whose sympathies lay with the British cause, went ashore and communicated his knowledge and suspicions concerning the activities of the *Mazatlan* to the British consul.

While at this port, the captain of the German merchantman *Marie*, then at Guaymas, and owned by a relative of Jebson, accompanied by several Germans, visited the *Mazatlan*. Before her departure, Jebson, Zur Helle, and their women companions left the ship. Jebson rejoined her at Topolobampo, the next port of call. Zur Helle, it is surmised, joined the *Leipsig*, and sank with her when she met disaster in the naval battle at Falkland Islands. Just before Jebson returned to the boat, Captain Paulsen of the *Mazatlan* told Smith that the German wireless operator could not work the ship's wireless apparatus, and that he, Smith, should immediately send a code message to the *Leipsig*. Under threats made by the chief engineer and other officers, Smith pretended to send the message, which, as later stated by Traub to Smith, was designed to acquaint the *Leipsig* with the position of British merchant ships and thus make them easy prey for the German cruiser. Smith reported to Captain Paulsen that the message had been dispatched. Thereupon, Paulsen tore up the message and threw it overboard. A similar episode took place the next morning. All this occurred at Topolobampo. The next morning, while still in port, the *Mazatlan* was commandeered by an official of the Mexican Government. The vessel, under governmental direction, went farther along the coast to Mazatlan. But, in October, 1914, the vessel was again in San Francisco.

The ship's fourth voyage, under the name *Mazatlan*, began October 14, 1914, and after much involuntary service in Mexican waters, terminated October 8, 1915. The first vicissitude encountered on the journey was a requisition of the vessel by followers of General Carranza, during which she

carried his troops and supplies. She then fell into the hands of supporters of General Villa. She was so held until October, 1915, when the sum of \$15,000 was paid to the captors for her release.

While the vessel was undergoing these experiences, John H. Rinder, a former British subject, and a member of His Majesty's naval reserve between 1890 and 1904, and, in 1914, a naturalized citizen of the United States, was engaged in the ship-brokerage business, and in general shipping in San Francisco. Upon several occasions prior to January 13, 1915, he had called at the San Francisco offices of the corporate owner of the vessel with a view to chartering her. Jebsen, meanwhile, for some reason, had developed a wish to sell the ship. In a letter sent to Rinder under date of January 13, 1915, he attributed such desire to "demoralized conditions on the Mexican coast." He suggested, however, that he would be willing to negotiate a charter with the strict understanding that the boat would not go to British Columbia ports.

Negotiations for a disposition of the ship were begun between Jebsen and Rinder. They continued until February 2, 1915, when an understanding was reached that the boat would be sold for \$115,000, her registry to remain unchanged until all payments should be made. In the same month, the negotiations culminated in an agreement of purchase and sale made between Lloyd Mexicano, S. A., and Rinder's principal, the Executive Co., a corporation organized under the laws of California.

The vessel, however, was still under detention in Mexico. Money was needed to secure her release, and her owner, through overdrafts, was indebted to certain banks, represented by one Wilson. In order, it is said, to secure payment of this indebtedness, and of any further advances, Wilson in April, 1915, took a bill of sale from the Lloyd Mexicano, S. A. In July following, he transferred the ship to a pocket corporation, called "Western Pacific Steamship Co." Some time thereafter, the sum of money, which the Mexicans who held the *Mazatlan* were demanding, was paid, and the boat was released on September 23. She at once sailed for San Francisco. She had hardly reached there when, upon October 12, 1915, the Western Pacific Steamship Co. gave a bill of sale to the Executive Co. It, in turn, on October 13, passed ownership of the vessel to Sudden & Christenson. The consideration for this transfer was \$125,000. Of this amount, \$10,000 went to the Executive Co. as its profit, the balance going into the hands of Wilson. From this latter sum, \$50,000 later followed Jebsen to Germany.

During the period that record title to the *Mazatlan* resided in Western Pacific Steamship Co., that corporation sought to have her admitted to American registry. The application seems not to have been regarded favorably by the authorities, and it was withdrawn on October 13, 1915.

On the very day that claimants acquired title, they took steps to bring the ship under the American flag and to record her under the name *Edna*. They succeeded about a month later. During this interval various departments

of this Government were asked to approve or recommend against the application. In the course of the proceedings more or less investigation was made of the vessel's history, and into the character of her new ownership. Shortly before the vessel was put upon the American rolls, I. B. Hibbard, upon behalf of Sudden & Christenson, in a letter of thanks to a Government official, said:

The *Mazatlan* has been looked upon with suspicion for the last two years, owing to the various escapades in which she has been engaged both with the Mexican and German interests. This, however, is all passed now. All of the old owners and interests have been eliminated. . . .

The formal certificate of registry is dated November 10, 1915, and it describes the craft as having been built in Norway—"as appears by affidavit of William H. Thornley, agent, in lieu of Mexican registry withheld. . . .

On the day American registration was completely effected, D. B. Dearborn & Co., New York ship agents, acting for claimants, chartered the *Edna* to W. R. Grace & Co., a well-known American shipping concern. In November of 1915 she cleared San Francisco carrying a cargo of flour and lumber for South American ports. She was bound there in order to be in position to fulfill her charter engagement, which was to carry nitrate from Chile. Reaching Antofagasta on January 18, 1916, she went on to Caleta Coloso and Mejillones, at which places the nitrate was loaded. It was consigned for delivery at Barbados and Martinique.

On January 27 the *Edna* sailed from Mejillones. Upon the same day, and before making much progress upon her course, she was overhauled and seized as a prize of war by H. M. S. *Newcastle*, in command of Captain Fowlett. The following day, Lieutenant Lord Congleton, from off the *Newcastle*, was appointed prize officer of the captured boat. With a prize crew on board, she was taken to Port Stanley, Falkland Islands, some 2,500 miles away, for an adjudication in prize.

Knowledge of the seizure did not reach claimants until late February or early March, 1916, when they received a cable advice. Putting themselves in touch with the American Secretary of State they informed him of what had occurred and stated their lack of knowledge of any reason for the seizure.

On March 22, 1916, summons was issued from the Supreme Court at Falkland Islands in a suit to declare the *Edna* good and lawful prize. The writ was returnable in eight days. On the date of issuance the process was served on the master of the *Edna*. Of this development the owners were promptly informed. They were, nevertheless, without knowledge as to the cause alleged for seizure. The first authoritative word along this line that came was contained in a cable from the American Embassy in London, which was relayed to claimants by the Department of State upon April 1, 1916. The message read:

Foreign Office now informs me that the steamship *Edna*, ex *Mazatlan*, has been captured on ground of enemy ownership and of transfer from the enemy flag after the outbreak of war, and that she will be brought before prize court for adjudication accordingly; also that it is

possible that other charges will be brought against the vessel in connection with her conduct during the war.

On the day claimants acquired this information, the Supreme Court at Port Stanley held a preliminary hearing in the prize cause. The sole representative of the owners and the ship was the master. The proper Officer for the Crown called attention of the court to the fact that no bill of sale had been found among the ship's papers, and that Mexican registration of the vessel had been withheld. But, he said, he based no argument on these circumstances. Lord Congleton who, at the time of seizure, did not know why the ship should have been taken into custody, testified at the hearing that he then had reason to suppose the detention of the *Edna* had been occasioned by the fact that prior to the war she was under the German flag, and had been guilty of performing unneutral services on her previous voyage.

The captain of the *Edna* was asked if he wished to address questions to Lord Congleton, and replied in the negative. When the master had thus spoken, the Crown laid two previously prepared petitions and proposed orders before the court. The first of the applications asked that the *Edna* be temporarily delivered to the Crown. The second requested a transfer of the proceedings to England. Both were granted. At this moment the master interposed to say that he had received a message from his owners in which they requested postponement of the hearing. To this the Chief Justice responded:

I am afraid your application is too late. I think that you will find that, the court having transferred the proceedings to the High Court of Justice in England, it will be far more convenient than if the case were conducted in this Colony. I have no doubt that the owners will fully acquiesce in this transfer to the High Court in England.

At some time between April 1 and June 15, the *Edna* was taken to London.

On June 16, the Solicitor of the British Treasury notified claimants that the case of the *Edna* would be brought to trial in July. Claimants, acting through Crump & Son, their London solicitors, endeavored to obtain particulars of the charges against the *Edna*, but they were not at once successful. On June 28 claimants learned that the charges related to unneutral service, and assistance to the enemy on the part of the vessel. In the absence of better particularization, claimants were advised by their solicitors to procure affidavits to meet the charges. Further effort to secure particulars of the wrongs alleged against the *Edna* elicited no response except information that not only did the British Treasury refuse particulars, but that the Prize Court upheld such refusal. Claimants then appealed to the American Government for assistance, and finally upon July 7, 1916, through this medium, learned that an additional alleged ground for seizure was that the *Edna*, when known as *Mazatlan*, had supplied coal to the *Leipsig*.

During all this time claimants were busily engaged in assembling proof

and documents designed to establish the neutrality of the vessel and her freedom from conduct which justified her seizure and condemnation. However, the evidence which claimants wished to produce could not be collected in time for a trial of the issues at the July sittings of the British court.

Claimants also sought to have the vessel released on bail. While the transcript of court proceedings before me fails to reveal such application and respondent argues that none was made, the records of claimants' American attorneys, and those of their English solicitors, tend strongly to establish the contrary, albeit the application may have been informal.

Apparently, upon July 21, 1916, claimants' local attorneys cabled William A. Crump & Son, London solicitors, suggesting that the vessel be bailed for \$125,000. On July 22, 1916, the proposal was communicated to the British authorities. On July 26, the Crown seems to have voiced opposition to bailing the ship inasmuch as she had already been requisitioned for use by Britain. The correspondence between claimants' London solicitors and their American attorneys indicates that the Prize Court would not permit formal application for bail, in that the court was without power to act thereon until the requisition of the vessel had been set aside. This course of action was in the face of the statement made by the British Secretary of State for Foreign Affairs to the American Ambassador to England, on February 10, 1915, in connection with the seizure of another American vessel, that "if an application of this sort is made by them, it is not likely to be opposed by the Crown."

About coincident with the effort to have the *Edna* released, the Crown specified the charges advanced against her. Thereupon, claimants devoted their efforts to a completion of their proof. By December 7, 1916, their evidence had taken final form. With the exception of a single affidavit bearing the last-mentioned date, and which was procured to meet an alleged surprise averment of a witness of the Crown, the proof was ready for submission to the court by late October, 1916. The Crown, upon its part, was not so diligent. Indeed, it was not until November 19, 1917, that the British Government had collected all the proof that was to be presented against the *Edna*.

From this time until April 2, 1919, when the case was moved for trial in the probate, divorce, and admiralty division of the High Court of Justice, before the late Right Honorable Lord Sterndale, president, the contending parties, whether deliberately or otherwise, managed to postpone final adjudication. First, the Crown offered to purchase the ship for \$125,000. The owners asked \$550,000. Then the vessel was reported as having been lost. This occasioned further delay. The Crown suggested its willingness to pay \$270,000 for the ship. Again, claimants declined to accept. The Crown thereupon became desirous of awaiting a decision on the case of the steamer *Alwyna*, which was said to involve legal questions similar to those raised in the *Edna* litigation. These occasions for adjournments were followed in

December, 1918, by the death of the judge before whom trial was first moved, and the case had to await a further assignment. At last, upon April 2, 1919, the matter came on for adjudication and upon the same day Lord Sterndale delivered judgment. In rendering the same, he stated the only question in the case about which he had any doubt was "whether the Crown ever had any reasonable ground for seizing the ship at all." He went on to declare:

I have grave doubts whether they had. But on the whole, considering the curibus companies that were concerned in the matter, and considering what the history of this vessel is, I am not prepared to say that there was no reasonable ground for seizing her. I have grave doubt about it, I must confess. But on the whole, though with considerable doubt, I am not prepared to say that they have not proved that there was some reasonable ground for seizing the ship.

That being so, it seems to me to dispose of any question of damages; and it seems to me what was claimed for the deprivation of the use of the ship is really damages. I do not think the claimants can recover more than this—and this is not contested by the Crown—the deterioration, if any, which has occurred to the ship during the time she has been in the hands of the Crown. She was requisitioned under a temporary requisition, by an order of the Prize Court of the Falkland Islands, and she has been in use by the Crown since. If she has deteriorated in consequence of that use, or indeed for any other reason, while she has been in the hands of the Crown, that, I think, the Crown will have to make good. She does not come, in my opinion, within the exact words that have been read, of the prize rules, September 30, 1914, which provide that "Where the ship so requisitioned is subject to the provisions of order XXVIII, Rule 1, relating to detention, the amount for which the Crown shall be considered liable in respect of such requisition shall be the amount of the damage, if any, which the ship has suffered during such temporary delivery as aforesaid," because that relates only to enemy ships. But it seems to me, on principle, that the claimants are entitled to have the ship restored to them, as she was; and if by reason of the Crown, without justification, as I have found, detaining her and using her for three or four years, she has deteriorated, it seems to me they must make that good. I cannot give the claimants any more than that without holding, as I have said I cannot hold, that the Crown had no reasonable grounds for seizing the ship. In the same way, I cannot give the claimants their costs without coming to that conclusion. As I have said, I do not think, although I have grave doubt about it, that I ought to say there were no reasonable grounds. Therefore, I think there ought to be an order of release, the Crown making good any deterioration of the vessel during the time she has been in their hands, and no order as to costs.

From this judgment, each litigant appealed to the lords of the Judicial Committee of the Privy Council. Upon March 10, 1921, that tribunal, speaking through Lord Sunner, dismissed both the appeal and cross-appeal. The effect, of course, was that Lord Sterndale's judgment was affirmed. In the course of the decision of the Privy Council, it was said, *inter alia*:

There can be no doubt that when the ship was taken, those, at any rate, who directed the action of the cruiser had substantial ground for questioning her neutral or her private character. She had been so employed on the voyage above described as to justify inquiry, and after the first and before the second requisitioning by the Mexican authorities she was sent on another voyage along the same coast. Either requisitioning might under the circumstances have been really not unwelcome to her owners, for, till things had blown over, it would afford an unobtrusive seclusion for a ship that had earned for herself a certain amount of evil notoriety. The termination of this retreat was quickly followed by a transfer to the

United States Registry, and an intercepted letter revealed the fact that a German Government official had forwarded to Germany part of the purchase money paid for her. It is quite impossible to say that there was not probable cause for supposing that she had been a German "fleet auxiliary" and so was liable to seizure with a view to condemnation.

. . . The evidence, as it developed, showed much that was provocative of doubt and suspicion. The financial circumstances preceding and attending her sale showed a reasonable case for believing that Jebesen was engaged in creating a screen of United States intermediaries between himself and the actual buyers, such as would disarm the suspicions or defeat the investigations of a captor and make it possible to find a complaisant neutral, who would willingly and successfully act for his protection. Even when the claimants came to give their own account of the matter on affidavit, they did not explain away this mystification, but only disclaimed participation in it. It is true that they proved actual payment of the price, but cross-examination might prove that they had a greater connection with Jebesen's acts than was consistent with good faith or the reality of the sale. . . . Furthermore, although the oral evidence given in 1919 ultimately confirmed the account of their conduct which the claimants had given in affidavits before the end of 1916, they also put forward numerous other affidavits so flagrantly false that the learned President expressed his surprise at their using them at all. Instead of contenting themselves with a completed title as neutral buyers and with proving their independence and ignorance of the *Mazatlan's* earlier proceedings, they advanced a case, which was really Jebesen's case, and was untrue. The captors could not be expected to sift out the false affidavits from the true, and apply for the release of the ship on a case better than that which, as a whole, the claimants made for themselves. Those who put forward a case of which so large a part was disingenuous, must not complain if the whole of it, with their own oral evidence, was submitted to the judgment of the learned President, as a matter which only the court could decide. . . . The allowance of damages and costs is largely a question of discretion, which in past times has but rarely been answered unfavorably to captors, and it is enough to say that their lordships see no sufficient reason for differing from his (the President's) opinion.

The conclusion, therefore, must be that on no ground are the captors liable in damages or costs. The claim for something in the nature of an account of profits, earned by the use of the vessel while under requisition, is equally unsustainable. There is no theory of the relations between captors and claimants, still less between His Majesty, for whose use the ship was requisitioned, and the shipowners, which would support a claim of such a kind. . . . It is right to recognize that a result which restores the ship to her owners but leaves them without recompense of any kind for the loss of the use of her between 1916 and 1919 must be profoundly disappointing to them, and may seem to be not without some suspicion of paradox in law. It would be unsatisfactory that so long a time should have elapsed before this cause could be brought to an issue, were it not that the claimants do not seem to have taken any active steps to accelerate it and may well be supposed to have recognized that the delay was one which they could not fairly complain of. It is to be hoped, however, that, whatever the conditions of future wars may be, this case may never be regarded as anything but highly exceptional in this particular.

As reasonably might be expected, claimants felt aggrieved that, at the end of the Prize Court proceedings, they were denied damages for their deprivation of the use of the *Edna*. In the years between 1916 and 1919, as is commonly known, shipbottoms commanded extremely high prices and, had the *Edna* been available for use by claimants, she would have been a most valuable property. As matters turned out, the British throughout the three years, and more, that the *Edna* was in their hands, took full enjoyment of the vessel and at the end of the period, they were, according to the adjudication,

without the slightest liability to claimants, save to deliver the boat to her owners in shipshape condition.

The owners, having exhausted their rights in the courts of Britain, and feeling themselves to have been denied the justice which those courts should have rendered, asserted a claim against the United States under and pursuant to the provisions of an agreement made between this Government and Great Britain, under date of May 19, 1927. By this convention, the United States assumed certain obligations with respect to the settlement of claims of American citizens against the British Government in which judicial recourse had been exhausted. Claimants' grievance falling within this category, it was agreed between the owners of the *Edna* and the United States that the claim so asserted, together with the defenses thereto that are available to this Government, should be submitted to arbitration, and that I should pass judgment thereon.

In order to bring about an accomplishment of this end, the owners of the *Edna* as claimants, and the United States as respondent, have laid before me an elaborate record. It includes not only the record of all proceedings had in the British courts, but the data and documents of claimants and of their attorneys and solicitors as well. In addition, the case has been briefed by both sides, and argued orally.

With all this before me, and having set forth a summary of facts which appear to be the most relevant and material, I proceed to a decision.

Claimants advance two basic propositions which are stated as follows:

- (1) That no probable cause at international law existed for the capture of the *Edna*, in which event claimants became entitled to costs and damages; and

- (2) That regardless of the question of probable cause Great Britain, having requisitioned the ship and profitably used the same for three years, claimants became entitled to a sum representing the fair and reasonable value of that use.

Speaking for the Supreme Court of the United States in the case of the *Olinde Rodrigues* (174 U. S. 510, 535), Mr. Chief Justice Fuller said:

Probable cause exists when there are circumstances sufficient to warrant suspicion though it may turn out that the facts are not sufficient to warrant condemnation, and whether they are or not cannot be determined unless the customary proceedings of prize are instituted and enforced.

With this definition as a guide in determining whether the *Newcastle*—acting, as she doubtless was, under wireless instructions of competent authority in England—was possessed of sufficient probable cause to warrant seizure of the *Edna*, I place myself in agreement with the adjudications that have so held.

If this conclusion be warranted by the evidence and probable cause did exist, the captors, says the Supreme Court of the United States,

were entitled, as of right, to an exemption from damages; and if the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet farther and gives the captors their costs and expenses in proceeding to adjudication.

The *Apollon* (9 Wheat. 362, 372, 373).

While it may well be that anything and everything the *Edna* ever did was not enough to constitute her a public vessel of Germany, and was insufficient, justifiably, to warrant her designation as an auxiliary to the German war fleet, and that she was, therefore, capable of being sold and transferred to a neutral, after the outbreak of war, who might be entitled to hold and enjoy her free and clear of the consequence of previous unneutral conduct, she could not immediately divest herself of the reputation she had thus acquired. As a result of her conduct she had become notorious. Her acts in behalf of the *Leipsig* had been heralded to the world. These escapades, and Jebesen's participation therein, ultimately led to his indictment by a United States grand jury. In his desire to escape punishment, he seems to have fled the country, during the very period in which transfer to claimants was accomplished. In the light of revelations that were in process in late 1915 and early 1916, and which were known to all who were interested; no intelligent person would readily conclude that Jebesen, even though he had divorced his company of record title to the steamer, no longer was engaged in putting her at the service of his country. On the contrary, the natural inference would be that transfer of the boat was nothing more than a deceptive subterfuge, and that the new entrants into her management and control were there to assist Jebesen in his purpose. Doubt and suspicion of the good faith of the transaction were both reasonable and inevitable. Had they not been entertained, the British authorities would have been chargeable with a credulity wholly incompatible with the necessities of war.

The disclosures of this case are such as to take it entirely without the ruling made in the *Paquete Habana* (175 U. S. 677). In that suit certain fishing smacks that had been seized, upon the theory that they were properly subject to capture, were released and held to be entitled to costs and damages because of the nonexistence of probable cause for their capture. In giving thought to this adjudication, it should be remembered that, as a general rule, fishing boats which devote themselves to fishing have long been exempted from the effects of hostilities. (Halleck's *Elements*, Ch. 20, Sec. 21, 1 Pistoye & Duverdy, *Treatise on Maritime Prizes*, Title 6, Ch. 1, p. 314.) Not alone this, but the *Paquete Habana* had previously engaged in no unneutral activity, as had the *Edna* when she bore the name *Mazatlan*. Nor was the smack owned and directed in her movements by a reservist of an enemy power who devoted his time and attention to the war service of his fatherland.

Claimants' second proposition—to the effect that, since Great Britain profitably used the *Edna* for three years, claimants are entitled to compensation, whether by way of damages or otherwise—is one for which I feel a measure of sympathy.

The lapse of time that occurred before the Prize Court proceedings were concluded led Lord Sumner to comment upon the fact. He attributed the fault for delay to claimants' failure to take active steps to accelerate disposition of the cause. In part, I agree with him. I cannot do so entirely because the Crown seems to have been anything but anxious for a speedy adjudication. This, I should judge, was because use of the vessel was greatly desired. The celerity with which the *Edna* was requisitioned following her capture is indicative of this conclusion. It will be recalled that action looking to such use was all but completed before there was a preliminary hearing on the prize at Port Stanley. The indication is emphasized by the lack of coöperation of the Crown in claimants' effort to bail the vessel during the pendency of the cause in England. It gains positiveness by the reluctance of the Crown to release the vessel after Lord Sterndale delivered judgment that the vessel should be returned to her owners. That was upon April 2, 1919. The British wished the *Edna* to go to France. Consequently, she was not released until May 8, 1919, when the voyage had been completed. Claimants have since then received, however, from the British a sum in excess of \$9,000, representing the earnings of that voyage. Upon completion of the voyage to France the vessel was bailed upon a bond of £40,000.

The history of the war is replete with accounts having to do with the extent to which British shipping was ravaged by German submarines. These narratives clearly disclose the necessities to which the Crown was put in obtaining sufficient bottoms to carry on its maritime affairs. A reason, if not a cause for the willingness of the Crown to permit the prize proceedings to take a leisurely course is thus made manifest. So long as the laches or conduct of claimants contributed to the needs of the Crown, it is not to be held responsible therein. It was entitled to acquiesce in claimants' delays. While claimants were diligent in filing their affidavits, they were so ill-advised, or so base, as to include depositions that were misleading, if not entirely false. First of all, the affidavits lacked frankness in setting forth the true ownership of all interests in the *Edna*. Secondly, claimants should have known that Captain Paulsen's affidavit of July 8, 1916, contained statements that appear to have been made with deliberate intention to deceive. This course of procedure was not designed to lend confidence to the claim of the owners, nor to engender a tolerant attitude upon the part of the Crown. On the contrary, it created occasion for such delay as reasonably was required to disprove the contents of claimants' affidavits, and to show the world-wide scope of the intention of Germany to use neutral instrumentalities in furtherance of its hostile objectives.

The last affidavit filed on behalf of the British Government is dated November 19, 1917. It treats of the subject matter last mentioned. This information was important in that it was designed to show that the *Mazatlan*, under the law of nations, possibly was not a subject of lawful transfer to a neutral within the war period. However, this evidence was known to the

world long before November 19, 1917, and I can see little or no excuse why it should not have been in hand at a much earlier date.

As much is to be said of the affidavit of R. M. Greenwood, dated June 2, 1917, which relates to information contained in the *New York Times* of February 10, 1916. But, even after these affidavits were in the hands of the Procurator General, procrastination continued to characterize the proceedings.

In apportioning responsibility for this delay, it may be well to recite a part of the chronology of events as it appears from the records before me.

November 13, 1917.—Trial called. The Attorney General opens the case of the British Government. Trial was halted on news that vessel was lost. Crown offered \$270,000 in settlement.

November 20, 1917.—Claimants' London solicitors advise that case has been adjourned for fortnight.

November 24, 1917.—American Department of State advises that, upon Department's representation, trial has been adjourned for two weeks.

December 14, 1917.—London solicitors state that Crown is postponing further action to await judgment of Privy Council in case of *Alwynna*, which involved questions of unneutral service by prior owners.

February 3, 1918.—Information obtained that *Edna* is not lost.

February 19, 1918.—Procurator General presses for progress in negotiations.

April 22, 1918.—Claimants cable that their delay is due to their lack of desire to create impression that they are anxious to settle.

May 28, 1918.—Cable to English solicitors to obtain firm offer of settlement as alternative to continuation of trial.

August 21, 1918.—Solicitors advise that Crown reverts to £25,000 offer due to friction between Attorney General and Procurator General regarding former's earlier offer.

November 1, 1918.—Solicitors are instructed to reject Crown's offer.

November 21, 1918.—Crown's offer rejected.

December 26, 1918.—American attorneys request instructions from claimants in reference to holding case in abeyance owing to death of judge before whom trial was begun; new judge must be assigned.

December 30, 1918.—Solicitors cable that trial has been set for March 6, 1919.

December 31, 1918.—American attorneys cable suggestion that *Edna* be returned to owners and that they be awarded compensation.

January 2, 1919.—Solicitors state that diplomatic intervention desirable.

January 8, 1919.—Solicitors cable that Procurator General refuses suggestion of settlement.

April 3, 1919.—Judgment by Lord Sterndale.

May 8, 1919.—*Edna* released to claimants upon bond.

From the foregoing it is inferable that claimants, in their desire to obtain a good price for the *Edna*, or to have substantial compensation for her use, contributed to delay of the trial about as much as did the action of the Crown.

And yet, whatever may have been the responsibility of the respective parties, it is nonetheless a fact that the Crown used the vessel for three years and has been permitted so to do without payment of compensation in any form or guise. In my opinion, this result, whatever may be the state of prior

decisions, is essentially unjust. It will be recalled that Lord Sumner, in delivering the opinion of the Privy Council, said that the allowance of damages and costs is largely a matter of discretion. In so declaring, he appears to have indulged a more liberal view than did the Supreme Court of the United States in the *Apollon*, *supra*. However, his Lordship proceeded to indicate very clearly that captors usually are the beneficiaries of the court's discretion. As he did so, he gave recognition to the fact that the result of the *Edna* case "may seem to be not without some suspicion of paradox in law."

While it would seem that courts, and particularly those of last resort, in cases such as this, should have little difficulty in obviating all appearance of paradox in their decisions, they have not always hastened to do so. This appears to have been particularly true in prize matters. Consequently, in view of the harshness that has characterized this branch of jurisprudence, I am compelled to say that claimants have obtained a result which, however disappointing, would frequently be regarded in prize cases as an achievement of justice. But if the result be divorced from the rule of *stare decisis*, and be viewed in the light of fair and just dealing, claimants are entitled to some consideration. That they suffered grievous loss in being deprived of use of the *Edna* for more than three years must be admitted. Great Britain was the beneficiary of that loss for a period that was longer than her necessities and her rights as a belligerent reasonably required. While I fully recognize the immunity which has attached itself to sovereignty, and although I appreciate the respect which international tribunals have accorded such immunity and the tolerance they have had for the rights of warring governments, I am convinced that, as an arbitrator, I am in duty bound to conclude that claimants, in part at least, have a just grievance.

Claimants, I think, are not entitled to compensation for use of the *Edna* for such period as reasonably was necessary for the Crown to obtain an adjudication upon the charges made against the *Edna*. Neither can they, as heretofore said, rightfully ask compensation for such use over the time that was consumed by their own laches, or such as resulted from their desire to obtain a good price from the British Government. But, making full allowance for these considerations, I think it safe to say, although not with entire accuracy, that the dilatory course pursued by the Crown delayed the prize proceedings for one year beyond the date upon which they reasonably should have been brought to finality. Whatever may be the necessities of war, they ought not to be allowed to serve as excuses for beclouding, if not obliterating, the just rights of neutrals.

My finding, therefore, is that the claimants are entitled, in the nature of demurrage, to have upon the claim now before me, such sum of money at the rate of exchange prevailing on May 8, 1919, as will represent the amount they would have earned as charter hire had the *Edna*, as a neutral vessel within the port of London, upon May 8, 1918, been requisitioned by the British Government for a period of one year at the rate that, upon such date, was

being paid as requisition hire by that Government for steamers of the size and class of the *Edna*. This rate, I was informed, upon the argument, was 17 shillings per gross registered ton. If this be not correct, the parties may so inform me. The sum arising from this calculation shall be diminished by the amount, over \$9,000, paid by the British Government to claimants in respect of earnings of the *Edna* upon the voyage made to France after the rendition of Lord Sterndale's judgment.

All other items for which indemnification is asked, saving interest, will be disallowed for the reasons that such items, in view of the probable cause which the Crown had in seizing the *Edna*, would necessarily have been borne by claimants in the normal and regular course of Prize Court events. These items are properly chargeable to the events giving rise to the probable cause that justified capture of the boat.

Coming now to the question of interest, the agreement reached between the United States and Great Britain on May 19, 1927, does not specifically contemplate that interest should be paid upon such claims thereunder as receive favorable recognition by this Government. Whether interest shall attach to an allowance of a claim such as is here advanced, depends, very often, upon the action of the Congress. But, in this instance, the Congress has not acted. Having in mind, however, that the assumption of liability on this claim by the United States did not come about until May 19, 1927, and appreciating that only the sums saved to the United States by such agreement appear to be intended for the satisfaction of those claims of American nationals which fall within the scope of paragraph (2) of Article II, I should refrain from making an award of interest on the principal sum that I have decided should be received by claimants. Not being advised of the status of other claims coming within the scope of the agreement, I am in no position to determine their equities, and the effect thereon, of an interest allowance here. For this reason, it is my thought that, if Congress determines that claims established under the agreement should carry interest, the calculation thereof should be from May 19, 1927. I think, too, that the rate of any such calculation, in consideration of conditions existing over the greater portion of the intervening period, should not exceed four per cent per annum.

JOHN C. KNOX, *Arbitrator*

AN ACT

For the relief of Sudden & Christenson, Incorporated, John A. Hooper, Emil T. Kruse, Edward Kruse, Gilbert Loken, and G. W. McNear, Incorporated, or their successors in interest.²

Approved, August 19, 1935

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treas-

² Private—No. 237—74th Congress [S.2635].

ury not otherwise appropriated, the sum of \$78,025.83, with interest at the rate of 4 per centum per annum from May 19, 1927, to the date of the approval of this Act, jointly, to Sudden & Christenson, Incorporated, John A. Hooper, Emil T. Kruse, Edward Kruse, Gilbert Loken, and G. W. McNear, Incorporated, or their successors in interest, upon receipt by the Secretary of State of satisfactory releases from the respective claimants of all claims for damages resulting from the capture on January 27, 1916, and subsequent use by the British Government of the steamship *Edna*, as recommended in the decision rendered on December 22, 1934, by the arbitrator, John Clark Knox, judge of the United States District Court for the Southern District of New York: *Provided*, That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys, on account of services rendered in connection with said claim. It shall be unlawful for any agent or agents, attorney or attorneys, to exact, collect, withhold, or receive any sum of the amount appropriated in this Act in excess of 10 per centum thereof on account of services rendered in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$1,000.

BOOK REVIEWS

A Documentary Textbook in International Law. By Llewellyn Pfankuchen. New York: Farrar & Rinehart, Inc., 1940. pp. xxxiv, 1030. Table of cases. Table of documents. Bibliography. Index. \$6.00.

This volume, by a former student of Professor George Grafton Wilson, is dedicated to him and the Comrades of Government 4 in Harvard College. As a Comrade it is a pleasure to report on this book, which, I may say, appears to cover adequately the scope of Government 4. The volume includes chapters on the history and nature of international law and the general duties and rights of nations in their relations during peace and war.

As the title suggests, it comprises selections from source documents of international law such as decisions of international tribunals and high courts of justice (mostly American and British), international treaties and conventions, classic statutory pronouncements, and extracts from diplomatic correspondence and authoritative writings. These materials are arranged under appropriate chapter headings covering the fundamentals of international law. In order that the college student may not be lost in the woods of precedents and symbols of law, the author appends several notes to nearly every chapter (about 60 in all) explaining terms, discussing problems presented in the documents, and bringing together much of the learning on the subject, and, as the author says, knitting together the documentary materials. It is interesting to note that fully three-fourths of the materials are of recent origin—since the turn of the century.

At the end of each chapter, a careful list of references to texts, articles and treatises is given, followed by "Questions and Problems" upon the materials in the preceding chapter. No answers are given or available, but the author suggests that the references should help to resolve them.

The book has not the fullness of a case-book for law students, nor is it so designed. It is rather an introduction to sources and materials for the undergraduate. While the materials and problems and questions are necessarily and largely of a legal nature, they will excite the interest of the reader, particularly when given perspective by the teacher. Certainly a student who has covered this book in course will have done more than rub up against the subject. He will have become a worthy Comrade of Government 4.

L. H. WOOLSEY

A Collection of Neutrality Laws, Regulations and Treaties of Various Countries. (2 vols.) Edited and annotated by Francis Deák and Philip C. Jessup. Washington: Carnegie Endowment for International Peace; New York: Columbia University Press, 1939. pp. lxxviii, xxvi, 1615. Index. Cloth-bound, \$10.00; loose-leaf edition with service until Dec. 31, 1941, \$12.00.

The documentation behind the products of the Harvard Research in International Law is always impressive; that supporting the hotly contested draft

convention on the Rights and Duties of Neutral States in Naval and Aërial War is colossal; not to say overwhelming. With obvious justification, the Carnegie Endowment for International Peace, following the precedents established in connection with the drafts on nationality and diplomatic privilege, considered the raw materials worthy of separate publication. Professors Deák and Jessup have thus been enabled to make available a compilation of texts and translations which must greatly lighten the task of Foreign Offices, shipping boards and the practitioners of maritime law in countries which are still asserting the rights and observing the duties of neutrals. One might have added something on the lightened labors of future historians of neutrality; but perhaps, in view of Jessup and Deák, *Neutrality, Its History, Economics and Law*, it would not be tactful to suggest that there will be any further need of historians for the period covered.

As published, this collection extended from 1800 to 1938, reaching back in the special case of the United States to 1778. The supplement to the convenient loose-leaf edition brings it up to May 1, 1940, so that it includes such documents as the Declaration of Panama and all the numerous acts and decrees declaring and fortifying the neutrality of various states in the current war.

Much of the massive material here assembled has been synthesized in the draft convention published with its commentary as a supplement to this JOURNAL for July, 1939. That draft, like the laws, proclamations and treaties of which it is the quintessence, presents a striking contrast with the present conduct of the great Powers, whether belligerent or non-belligerent. The country to which the compilers and drafters belong, and which was in the past at once the strongest champion of neutral rights and strictest observer of neutral duties, has drawn a line about the area of combat and forbidden its ships to pass, and is giving "all assistance short of war" to one belligerent. A distinct status of non-belligerency, much like the helpful neutrality of an earlier age from which, under the guidance of the United States, modern international law had diverged, is in process of establishing itself. Like Professor Quincy Wright in the last number of this JOURNAL, many other jurists have been asking themselves whether neutrality as a legal institution can retain a place in the contemporary complex of international society. But perhaps the question should be put in its more fundamental form. Has the essential incompatibility of war itself with the whole concept of a legal system been sufficiently demonstrated? If so, neutrality also is on the way out.

While, then, this monumental collection will answer many questions that continue to confront the lawyers of some countries, its most enduring portion may be the remarkably full documentation on the attempt to enforce collective sanctions against Italy. For if war is ever to be made illegal, these are the precedents that will shine in use.

P. E. CORBETT

American Neutrality: Trial and Failure. By Charles G. Fenwick. New York: New York University Press, 1940. pp. xii, 190. \$2.50.

Professor Fenwick needs no introduction to readers of this JOURNAL, and his views on neutrality are well known, having been vigorously expressed on many occasions. In this volume, the result of lectures delivered under the Stokes Foundation at New York University, he takes occasion to restate these views somewhat more fully and systematically, but at the same time making a critical reëxamination of the entire doctrine of neutrality as a legal concept and as actually applied. In eight brief chapters he deals with the development of the law of neutrality, the recent neutrality legislation of the United States, neutral rights and neutral duties, blockade, contraband, the special problems arising out of the present war, and the relation of neutrality to peace for the United States and to a system of law and order for the world.

Fenwick's general theme is indicated by the title of the book, and the gist of his argument is pretty well summarized in the preface (pp. v-vi), where he frankly states that his purpose is to show the falsity of the traditional American assumptions about neutrality, and to show "that neutrality, instead of being the simple formula it was believed to be, was an inherently illogical and paradoxical system which had neither the facts of history to justify it nor the logic of practical politics; that it led inevitably to the situation where the neutral must surrender certain rights not worth fighting for and prepare to defend others which were too vital to surrender. Moreover, the announcement in time of peace that the United States proposed to treat alike the law-breaker and his victim was, if not an invitation to lawlessness, certainly no deterrent to those who were prepared to resort to force to attain their objectives. Thus, while reliance upon neutrality had its appeal as an easy way of escape from the moral obligation to distinguish between right and wrong in the complex problems of international relations, it involved the great danger that adequate preparation would not be made to defend ourselves against the unpredictable outcome of the war in which it was proposed to be neutral no matter what issues might be at stake."

Although writing with such definite viewpoint and purpose, Fenwick in fact gives us an unusually comprehensive and lucid, even if summary, treatment of the whole concept of neutrality and the problems arising out of its application. In spite of the author's strong convictions, the book is dispassionately written, and reflects not only his ripe and wholesome scholarship, but also his practical experience, as a delegate to two recent Pan American conferences and as a member of the Inter-American Neutrality Committee, with actual neutrality problems. The book is a splendid contribution to an understanding of present problems.

CLARENCE A. BERDAHL

Papers Relating to the Foreign Relations of the United States. The Lansing Papers, 1914-1920. Washington: Government Printing Office, 1939-1940. 2 vols., pp. lxiv, 801, xlii, 576. Indexes. Vol. I, \$1.50. Vol. II, \$1.25.

Papers Relating to the Foreign Relations of the United States, 1924. Washington: Government Printing Office, 1939. 2 vols., cxiv, 780, xciv, 764. Indexes. Each volume, \$1.50.

These four volumes are valuable additions to the printed material on American foreign policy. The first two record developments through a period of stress and of war, the last two the principal happenings in a relatively peaceful year which found many problems growing out of war still unsolved. The selection and arrangement of materials has been done with the great care and efficiency which students of American foreign relations have become accustomed to finding in the work of the Division of Research and Publication of the Department of State.

The Lansing Papers, which need to be read along with the *Foreign Relations* for the respective years of the period from 1914 to 1920, throw additional light on the troubles of the United States as a neutral, from 1914 to 1917. In his memorandum of December 1, 1916, Mr. Lansing observed that "Neutrality is a state which becomes increasingly difficult to maintain the longer it lasts," and proceeded to describe the perils and difficulties involved. Much of the first volume of the *Papers* is taken up with discussion of submarine warfare and possible modification of international law thereon, and of such matters as the status of armed merchantmen, or that of "submarines in parts" and hydroaëroplanes as contraband.

More striking, especially in the light of events of 1940, are declarations of some public men of the time on the anticipated effects of a German victory. Thus may be noted—at the risk of separating single sentences from their contexts—the statement of the American Ambassador in Germany, on October 25, 1915, that "If these people win we are next on the list—in some part of South or Central America which is the same thing" (I, 665), Walter Hines Page's belief, recorded February 17, 1916, that "The great English-speaking nations without [any] formal alliance will control the conditions of permanent peace" (I, 705), the opinion of unnamed persons, reported from Rome by Thomas Nelson Page, March 17, 1915, that after the war was over the United States would probably have to look out for Germany on one side and Japan on the other (I, 721), and Mr. Lansing's own expressed disinclination, after the United States became a belligerent, to temporize or compromise with the "ruffians who brought on this horror" (II, 120). Reports on the probability of starvation in Europe (I, 679, II, 17), and Ambassador Page's description on October 1, 1917, of the bombardment of London—six raids in eight nights—do not seem very strange to present-day readers.

More technical matters of public law on which there is material for the period of American belligerency include the conscription of declarant aliens

(II, 65, 174-198), recognition of Czechoslovak belligerency (II, 144-145), and the practical distinction between *de facto* and *de jure* recognition (II, 566). The second volume also furnishes additional light on the Lansing-Ishii negotiations and on efforts looking to a treaty system of obligatory amicable settlement in the Western Hemisphere.

The volumes for 1924 record some less dramatic developments, at a time when reparation payments were still the subject of considerable negotiation and when the United States was cautiously avoiding committal statements as to enterprises involving the League of Nations. During the same period the United States made a group of so-called "liquor" treaties, and had begun to adhere to an announced policy of unconditional most-favored-nation treatment. Non-recognition of the Soviet Union, and Russia's rearrangement of her diplomatic and treaty relations with other countries, such as China and Persia, caused diplomatic problems for certain Powers, including the United States. Especially instructive, both as to background and the then current development, is the selection of documents on Japanese-American relations in connection with the exclusion features of the United States Immigration Act of 1924. Matters entering into discussion include the "grave consequences" note of Ambassador Hanihara and the Japanese claim that the Act of 1924 disregarded the spirit and the circumstances underlying the 1911 commercial treaty (II, 400, 410).

Jurists whose interest is in the application of technical international law will find in the 1924 volumes, among many other materials, statements on the legality of Mexico's closing its ports without belligerent blockade (II, 440), on the American position as to the inadequacy of discovery and the formal taking of possession as means of acquiring title to Polar regions (II, 519, 520), on the waiver by a national of his right to protection in a foreign country (I, 602), and on the non-liability of the United States for injury to a British subject in the Dominican Republic while the latter state was under American occupation (I, 686-691).

ROBERT R. WILSON

Staatsvertreter vor internationalen Schiedsgerichten. By Hans Rupp. Berlin: Junker and Dünnhaupt, 1938. pp. 125. Rm. 5.50.

This is a study of the position of the official claims "agent" before international arbitral tribunals. It deals with the relations of the agent to his own government, to the opposing agent and government, and to the tribunal. It deals also with his relations to counsel that his government or that, by permission, private parties in interest may appoint. It includes certain matters of primary importance in international arbitration, such as the revision of awards.

The sources of the author's study are certain recent protocols of arbitration and the rules of various tribunals or commissions. Emphasis is usefully laid upon the fact that the agent is not merely counsel for a private claimant, but is a responsible representative of his government before an international

tribunal created by both governments. He therefore has international legal status and the rules of international law determine most of his jural relations. The procedure that he follows from the time of his appointment, initiation or defense of a claim, through a possible compromise down to the final award and petition for rehearing finds its source in the rules of the commission or in practice developed before international commissions. The author mentions the unusual practice of the Mixed Arbitral Tribunals under the peace treaties of 1919 which, in addition to official representation, permitted private parties and their attorneys to appear directly before tribunals. Whether private counsel may plead before commissions depends on rules. That they often carry the brunt of the work in preparing a case is common experience; but when official agents only are permitted to appear, private counsel ought not to be designated as deputies to evade the rules.

The author leaves unmentioned a matter of recurring importance, namely, what responsibility does the Foreign Office and its agent assume toward the other government and its agent for the integrity of the claim or the claimant? Are they permitted to submit all claims that fall within the formal jurisdiction of the commission and leave it to the other side and the tribunal to discover their weaknesses? Or are they under a duty to weed out all doubtful claims *ex officio*, so as to guarantee to the other side their own conviction that the claim is sound in fact and in law? It seems to the reviewer that a government and an agent fall under the latter responsibility. That perhaps is one of the main reasons why a private claimant cannot be permitted, except by special arrangement, to present to an international tribunal a claim which carries with it the theoretical endorsement of his government. Perhaps such special arrangements should be encouraged. But it should be clear that the private claimant speaks entirely for himself and in no way commits his government. The agent inevitably commits his government, and for that reason the Foreign Office should remain in close touch with and if necessary supervise his activities.

EDWIN BORCHARD

Legal Technique in International Law. A Textual Critique of the League Covenant. By Hans Kelsen. New York: Columbia University Press; Geneva: Geneva Research Center, 1939. pp. 178. 40¢; Sw. Fr. 1.75.

This brilliant study from the pen of Hans Kelsen should be of immense value to serious students of international law. It has much of the value of a seminar in legal drafting. The fact that the League of Nations has collapsed in no way detracts from the lessons in legal technique to be learned from a perusal of this monograph. For those who believe that the League can eventually be revived, Dr. Kelsen's proposed revisions of the Covenant will be worthy of serious consideration. However, it is primarily as a study in the drafting of international legal instruments that the monograph merits the attention of international lawyers.

Professor Kelsen rejects with some vehemence the "commonplace" that

the League Covenant "is more a political than a legal instrument and that it can therefore not be submitted to a juridical interpretation." The proper distinction is not one between "political instruments" and "legal texts," but between two kinds of legislative techniques, one of which institutes detailed stipulations, while the other leaves large latitude to the authorities charged with the application of the rule. Both of these techniques are properly subject to the juridical method of interpretation—in the latter case to discover whether an ambiguity or lack of precision is intentional, or "the regrettable result of an inadequate juridical technique so that the insufficient preciseness of the norm constitutes a technical error."

The failure of the League, Kelsen admits, was not due to technical flaws in drafting the Covenant, but those flaws were sufficiently serious to warrant greater attention from international lawyers. In his examination of the Covenant, Professor Kelsen subjects each phrase or clause to what he calls juridico-technical standards and sets forth the juridical revision (as opposed to "reform") which he believes necessary to correct technical flaws in drafting ("superfluous provisions, provisions which it is impossible to put into operation, and provisions having no meaning"). One may not always agree with Professor Kelsen's conclusions, but, to the reviewer, the monograph was more interesting than the commentaries of other authors.

HERBERT W. BRIGGS

Commentaire Théorique et Pratique du Pacte de la Société des Nations et des Statuts de l'Union Panaméricaine. By J. M. Yepes and Pereira da Silva. Vol. III. Paris: A. Pedone, 1939. pp. vii, 328. Fr. 50.

In the preface to the first volume of this work, which appeared in 1934, its purposes were stated to be (1) a commentary on the Covenant of the League of Nations, (2) a study of the origins, organization and work of the Pan American Union, and (3) a comparison of the two. The articles of the Covenant are taken up one by one, and, after many pages of discussion of each article, a very few pages are allotted to the similar functions of the Pan American Union. The contrast between the two, whether intentional or not, is thus made striking; it is not, however, unfair, for certainly the latter deserves little space in comparison with the former. It is explained also that more attention is to be given to practice than to the juridical features of the League. The same purposes and plan are carried through into this third volume, which covers Articles 18-26 of the Covenant. This volume appeared after the beginning of hostilities in Europe, and an inserted leaf explains that the authors see no necessity for changing the views stated; on the contrary, "ils portent, en effet, sur des principes dont la guerre actuelle, loin de marquer la disparition, démontre, au contraire, l'impérieuse nécessité." They are confident that peoples will again, before long, recognize their necessary solidarity and return to the only system capable of assuring their pacific coexistence.

To the international lawyer, the comment will often appear to be insufficient. He will, for example, expect to find citations for the statement that the Permanent Court of International Justice has often held that treaties are valid before registration; he would like a more thorough study of the mandates or of the amending clause. But the purpose of the authors is more sociological than juridical. They include, for example, some study of the proposed Four Power Pact in its relation to the League. They interpret Article 20 as making the Covenant the supreme law of the world; treaties of alliance are therefore illegal, but they have nevertheless prevailed over the Covenant. Thus, Albania put her treaty with Italy above her obligation under the Covenant to employ sanctions against Italy; and the policy of neutrality, led by Switzerland, has likewise taken precedence over the Covenant.

The clause containing the reference to the Monroe Doctrine is discussed at some length; that doctrine is here accepted, not as hegemony by the United States, but as a real regional agreement. In this connection, various regional ententes are considered. The Chaco conflict, they say, proved that the League of Nations could intervene in American affairs, but also proved the necessity for continental organization. The mandates are printed verbatim, but there is little discussion of them beyond the assertion that it is a waste of time to search for the location of sovereignty in them. In view of the recently increased importance of the technical organizations of the League, too little is said about them; even less concerning American technical organizations.

While this reviewer has felt that the comment is at times insufficient and inconclusive, he is impressed with the common sense and fair treatment of the various problems, and particularly in the comparison between the League system and the American system. The work contains a great deal of useful material which is not to be found in other such works; from it one may obtain a broader, if not so precise, view of the problem of international organization.

CLYDE EAGLETON

La Validité des Traités Internationaux. By Edoardo Vitta. Leiden: E. J. Brill, 1940. pp. xii, 247. Gld. 12.

In the introduction to this well-written volume, the author indicates his intention to confine his study to those aspects of the law of treaties having to do with the negotiation and conclusion of a valid treaty. He proceeds, in the subsequent four chapters, to consider such matters as the juridical effect of conventional and constitutional limitations upon the capacity of states and upon the competence of governmental organs to conclude treaties; the effect of fraud, error or duress involved in the conclusion of a treaty; the status of treaties which are impossible of performance or are in conflict with preëxisting treaties or customary law; and the legal significance of the form in which a treaty is embodied. For reasons not altogether apparent, the

questions of necessity of ratification, exchange of ratifications, accession, and registration are also discussed in the chapter headed *La Forme*.

In discussing each of the several problems indicated, the author summarizes and examines critically the various opinions expressed in the existing literature on the subject, reviews the precedents established by state practice or judicial decision, and then sets forth his own views as to what appears to be the law. In most instances those views may be described as orthodox. The present reviewer cannot agree with Vitta's opinion that constitutional provisions have no international significance whatsoever and that therefore a treaty concluded by a head of state in plain violation of clear and well-known constitutional provisions is nevertheless internationally valid and binding. On the other hand, he finds interesting Vitta's rejection of the traditional distinction between duress against the persons concluding a treaty and duress against the state itself, in favor of a distinction between duress against state functionaries as regards their private interests and duress against state functionaries as regards interests of the state. ("*Violence contre le fonctionnaire en tant que personne*," and "*violence contre le fonctionnaire en tant que organe*." p. 121.)

In most instances, it may perhaps be said, Vitta's opinions do not differ significantly from nor add materially to what has already been written by leading authorities on the law of treaties. Nevertheless, his book is useful because of the clarity with which he summarizes the various theories which have been expounded by others and because of the veritable wealth of materials cited in the footnotes. In the latter may be found an admirable bibliography of works dealing with treaty law. It is unfortunate that, after the manner of so many books published on the continent, some (relatively few, to be sure) of those footnotes, particularly when in English, are marred by errors which careful proofreading should have eliminated.

VALENTINE JOBST III

The Twenty Years' Crisis, 1919-1939. By Edward Hallett Carr. New York and London: Macmillan Co., 1940. pp. xvi, 313. Index. \$3.00.

This useful book by the professor of international politics in the University College of Wales is written in clear, convincing style, and is admirably objective and unbiased throughout. It was completed before September 3, 1939, but published afterwards without revision: hence it represents a prewar viewpoint. In content it presents a good overview of the trend of international affairs since 1918, not so much in terms of actual events as of the principles involved. The approach is largely philosophical.

The author treats fully the historical differences between utopian and realistic thinking before 1918, with emphasis on Benthamite rationalism. He criticizes severely the work of the Paris Conference as being utopian. These criticisms would be better grounded if the author had indicated in one or more specific cases what better solutions should have been adopted by the

peacemakers. The author at times seems to confuse the legal or juridical equality of states, on the one hand, with political or influential equality on the other.

There is an excellent discussion of the ultimate identity or lack of identity between economic as contrasted with political and moral issues. In the chapters on the morality of nations it is not clear whether, in the author's opinion, states do or should subordinate their national interests to the general good because they have a disinterested desire to support that good or because they consider such action a necessary step of enlightened self-interest. The final chapters are apparently not constructive as to plans for a future and better world. But there is a frank admission that international law cannot stand alone and can function only as a branch of an effectively organized world society; and that a better moral basis must be found for any new, enduring world order.

BESSIE C. RANDOLPH

Peaceful Change and the Colonial Problem. By Bryce Wood. New York: Columbia University Press; London: P. S. King & Son, 1940. pp. 166. Index. \$2.00.

This important study deals with the nature, limits, timing, conditions, and procedures of peaceful change, and presents the fluctuations of public opinion and official attitudes in Germany and Great Britain with respect to changes in the status of the former German colonies from 1920 to 1939. The latter study is based on the official utterances of statesmen, parliamentary debates, and unofficial expressions of opinion. Especially interesting is the summary of letters to the London *Times* on the colonial question during this period.

The writer emphasizes the difficulties of peaceful change of territory so long as the assumptions of the balance of power system are accepted. Possessing Powers will not yield to demands for change when they are not threatened because there is no present reason for doing so and the potentialities of the future are vague. They will not yield to such demands when they are seriously threatened because to do so would usually weaken their position and render them more vulnerable to further threats. Peaceful change under conditions of power politics is, therefore, only likely when there is confidence that the transfer will not seriously weaken the possessor and will appease the demander, and when there is conviction that the demander is likely to become dangerous in the future if not appeased now. The study suggests that there may have been a brief period after the advent of Hitler when these conditions were approached, but direct demands for colonies were never made by Hitler, perhaps because the lack of colonies was more useful to him for domestic purposes than would have been their acquisition (p. 142), and British confidence that colonies would appease Hitler soon evaporated. The great majority of British opinions opposed such cessions on the grounds that native welfare would suffer if subjected to Hitler's racial ideas and that colonies would be used as bases for further acquisitions.

No one either in Germany or England seems ever to have taken very seriously the idea that colonies would assist in solving the German economic problem.

Dr. Wood emphasizes the influence of restrictions upon trade and migration in augmenting demands for territorial transfers, and the influence of the increased destructiveness of war in augmenting the importance of peaceful methods for dealing with such demands. He, however, sees little hope for solution without radical modification of the balance of power system. An effective legislative system in which world opinion can dominate over the interests of particular nations is, he thinks, the only solution, and this means a "world state probably federal in form" (p. 159). Even that would not guarantee the peace of the world against an occasional need to defend "the methods of peaceful change themselves" against revolutionary demands and movements.

The book throws important light on the reasons for the failure of the peace of 1920, and upon the inconsistencies of existing ideas of international relations which must be eliminated before the prospect for either justice or order through law will greatly improve.

QUINCY WRIGHT

Contemporary International Politics. By Walter R. Sharp and Grayson Kirk. New York: Farrar & Rinehart, 1940. pp. xviii, 840. Index. \$4.00.

It has been but natural that, in view of the unparalleled importance which international affairs have assumed of recent years, a number of volumes should have appeared seeking to interpret the underlying forces that are shaping the policies of governments and to give some indication of the manner in which they are moulding the destinies of states. While the purpose of many of these volumes has been primarily to meet the needs of classroom instruction in our colleges and universities, their usefulness is also coming to be appreciated by the American people at large who have slowly, perhaps suddenly of late months, become aware of the intimate connection between events in distant parts of the earth and the peace and prosperity of their own individual lives. Wars in other parts of the world can no longer be denounced as if they were taking place upon another planet. Isolation in respect to the political issues of a conflict has not brought isolation from its economic consequences. The challenge of a generation ago has come once more to find a constructive solution for war. For this there is needed a thorough knowledge of the facts, a clear understanding of the forces that are shaping them, and a sound judgment with respect to causes for the failure of the means thus far taken to offset them. This is what the authors, within the limits of a single volume, have sought to give us.

The value of the analysis here presented is obviously dependent upon the degree to which the authors have succeeded in gathering the relevant facts and in presenting them in as accurate and impartial a manner as is possible in dealing with issues many of which are intangible and susceptible of dif-

ferent interpretations. In no other field of study, unless it be that of ethics, is there so little agreement upon the fundamental assumptions that form the basis of analysis and criticism. It is not to be expected or desired that the authors of a volume such as this should divest themselves of their own personal convictions in respect to the standards by which the conduct of nations should be judged. All that we can ask of them is frankness in the assertion of those standards and integrity in the application of them. In this vitally important respect the reviewer finds the volume above reproach. The authors write in the "liberal" tradition, if that can be interpreted as meaning that they have faith in the possibilities of international coöperation and that they believe that the failures of the past two decades have been due, not to deterministic forces that are driving man to a fate over which he has no control, but to mistakes and failings that it is within his power to correct and make good. The outlook of the volume is therefore optimistic, in spite of its devastating presentation of facts that at first reading create misgivings whether the goal of an ordered world is within man's power to attain.

The treatment of the subject-matter is in accordance with a "functional interpretation" of the several "interlocking factors" of geography, population, race, nationalism, technology, economics and government. Part One, described as "The Setting," begins with a general survey of the state system and power politics, which is followed by a study of geography and natural resources, population pressure, nationality and nationalism, and the technological and social factors making for interdependence. The skill of the authors and their good judgment appears conspicuously in the chapter on "Nationalism as a Cult," where they illustrate in various ways how normal bonds of nationality and sentiments of patriotism can be combined by psychological processes to produce "the dominant secular religion of the contemporary world: the cult of national power."

Parts Two and Three, dealing with "Imperialism" and "The Economics of World Politics" cover more or less familiar ground, but they do so in a way that clarifies many of the complicated problems involved in what is popularly known as "economic nationalism." The question of the control of native races deals with the social as well as the economic aspects of the problem, and it is accompanied by an exceptionally fair appraisal of the difficulties of the administration of the mandates system. The sections on foreign investments, debts, and trade barriers, contain much useful information not readily available in so compact a form. Numerous tables in illustration of the text are presented, and the text itself is lucidly written without avoidance of technical details. The section on "Economic Nationalism and the Depression," showing the short-sighted efforts of governments to meet an international problem by concentration upon individual national interests, is such a fair and well-balanced analysis of the mistakes and good, but unfulfilled, intentions of recent years as to merit separate publication.

Part Four surveys the "Instruments of Conflict," militarism, the arms problem, propaganda and censorship. Parts Five and Six bring us to the main theme of the volume, "The Struggle to Organize Peace" and "The Resurgence of Power Politics." Under the first of these titles we are given in successive sections a careful and scholarly treatment of the earlier methods of pacific settlement, the evolution of the Covenant of the League of Nations and the operation of the League system, the Permanent Court of International Justice, the International Labor Organization, and the various measures taken to attain security and to promote disarmament. The section on "The Illusion of Peace without Security" is characteristic of the clearness with which the authors analyze the fundamental relationships of the post-Versailles period and the well-balanced criticism with which they appraise the efforts made by statesmen to make effective the principles of the League when confronted with the difficult political issues involved in what Briand described as the problem of "organizing" peace. The weaknesses of the Kellogg Pact are pointed out, but the authors justly observe that at the least it was "a magnificent gesture toward a new ethical evaluation of war," and that it might have supplied the key to effective coöperation by the United States with the League system if the American people had been willing to "follow through." The description which the authors give of the circumstances attending the rejection by the United States both of the League of Nations and of the Permanent Court is, in spite of the restrained language in which it is phrased, a strong indictment of proclaiming ideals of international law and justice and being unwilling to take part in any of the practical measures by which those ideals might have been made effective.

In "The Resurgence of Power Politics," which constitutes the final series of sections, the authors examine in detail the impact of Fascism in Europe, the failure of the League to restrain the Italian conquest of Ethiopia, the Spanish civil war, the aggression of Japan against China, "appeasement" at Munich, the "tragedy of Czechoslovakia," and the outbreak of war. These highly controversial topics are described with an unusual degree of impartiality, notwithstanding the fact that the authors are frank in expressing their own convictions as to the causes for the breakdown of law and order in the international community. A section on "Inter-American Relations" emphasizes the necessity of supplementing the "good neighbor" policy with a realistic program of economic and cultural coöperation. (It was a slip of the pen, one of the rare slips in the volume, that described the conditions under which Latin American states were exempted from the provisions of the Neutrality Act of 1936.) In "American 'Neutrality' Reconsidered" an account is given of the neutrality controversy and the several acts adopted since 1935. Here again the analysis is impartially accurate, while frankly critical of such inconsistencies as the limitations of the "cash and carry" plan of the Act of 1937 and the pretense of a conformity to international law in the advocacy of the Act of 1939. A final section on "The Organiza-

tion of Peace" surveys the various proposals put forward for the reorganization of international relations at the close of the war.

The authors are not only to be congratulated but to be thanked for having given the public so accurate and comprehensive a survey of international relations, written in an exceptionally readable style, and marked by such well-balanced interpretation and criticism. The volume is an outstanding contribution to a knowledge of the underlying forces of international politics; it tells the story of recent events graphically, yet without sacrifice of the details necessary to an adequate comprehension of the subject; and, what is most important, it is at all times fair in its criticisms and constructive in its appraisal of the mistakes of our foreign policy. It is to be hoped that the volume will be widely read and studied.

C. G. FENWICK

The World Since 1914. 4th ed. By Walter Consuelo Langsam. New York: Macmillan Co., 1940. pp. xviii, 1024. Index. \$5.00.

The historian's lot is never a happy one when he undertakes to write of his own time. Lacking the perspective which only the future can bring, he is tempted to indulge in a formless chronological array or to "tell all" in monumental and meaningless profusion. Genial and provocative Professor Langsam of Union College has not altogether avoided these pitfalls, but at least it may be said that this most recent edition of his lengthy history is a comprehensive text, displaying admirable qualities of industry, lucidity and erudition, and embellished with useful maps and excellent pictures. With its detailed index, its 71-page bibliography and its 24 chapters, neatly ordering events by topics and countries from Sarajevo to the Nazi invasion of Poland, it is a helpful guide and reference work.

Only because this work is already so good does one wish it were better. Since a 5th edition is some time inevitable, suggestions for improvement should be welcome. The world since 1914 is a chaos of a civilization in decay. But the historian owes it to his science to reduce chaos to order (since even chaos has its hidden laws) and to disclose the processes of change by organizing his material around the major sources of maladjustment and conflict. This Professor Langsam has failed to do. He might succeed were he to peruse the writings of Arnold J. Toynbee, who is mentioned only in the bibliography, and those of Oswald Spengler, who is lightly dismissed as a minor prophet of German gloom. Modern man is losing his heritage because he has failed to organize and defend a world political order commensurate with the world society of our age, and because he has failed to master the Machine which he once believed was his slave. These *Leitmotifs* of the mid-century are nowhere sharply rendered in these pages. The shape of the woods is therefore lost for the trees.

Other weaknesses deserve mercy. Questions of proportion are always debatable. But one wonders why the relations among nations, which have more and more shaped life within nations, are not given more attention

than details of domestic politics; why Part IV, "Europe and Asia Since 1935," gets only a hundred pages out of a thousand; why the diplomatic origins of the war of 1939 receive only eight poor pages at the end; and why the rise of Hitler is presented with no reference to the conspiracy of January, 1933, the Munich crisis with no reference to the Allied ultimatum of September 19, and "appeasement" with no reference to Tory hopes that the Nazi *Drang nach Osten* would leave the West in peace. Looseness of expression, moreover, leads to misstatement of fact. It is inaccurate to say, for example, that "In March Premier Negrin flew to France, while in Madrid General Miaja was chosen by his colleagues to head a new defense council" (p. 838), or that "The Soviet Union would aid [Czechoslovakia in 1938] only on condition that France did so first" (p. 859), or that "On August 31 the Germans advanced a 16-point program for settling the Polish dispute, but this was unacceptable to Warsaw" (p. 910). On these points, and on many others, there is room for vast improvement. For the rest, congratulations (and adoptions) are in order.

FREDERICK L. SCHUMAN

Journal as Ambassador to Great Britain. By Charles G. Dawes. New York: Macmillan Co., 1939. pp. xii, 442. Ills. Index. \$5.00.

The United States regularly sends a political appointee with no diplomatic experience to represent us at the Court of St. James's—our highest ranking diplomatic post. The result has not always been a happy one, nor can we say that the two and a half years' sojourn of General Charles G. Dawes as our ambassador in London has improved appreciably the rating of non-career diplomats. Nevertheless, his *Journal*, which gives a day-by-day account of the critical period from June 15, 1929, to January, 1932, as he saw it from his very advantageous position, shows that much of the violent criticism leveled at his work and his methods is not justifiable. In fact, one would never guess from a reading of these dispassionate memoranda that their author was the fearsome "Hell 'n Maria" individual who, as Chairman of the General Purchasing Board of the American Expeditionary Forces, brought order and efficiency into the service of troop supplies as much by his vivid personality as by his outstanding ability.

The most important task which faced Ambassador Dawes during his representation of the United States in Great Britain was the problem of arms limitation culminating in the London Naval Conference of 1930. As one of the United States delegates his grasp of the technical as well as the political aspects of the question, as well as his close personal relationship with Premier Ramsay MacDonald, enabled him to play a very effective rôle. His influence was always on the side of common sense, statesmanlike coöperation for the ultimate end, and against the quibbling over fine technical details so dear to the naval expert's heart. Ambassador Dawes pays rare tribute to both President Hoover and to Dwight Morrow for their ability in ironing out difficulties and achieving a compromise satisfactory to all.

He does not give as much attention as one might expect to the European financial collapse, although his brief discussion is an excellent one. He explains the final acceptance of the Hoover moratorium on the part of France, but he does not mention the failure of the United States to consult with France in advance as one of the reasons for French opposition to the plan.

Probably the most difficult diplomatic problem faced by Ambassador Dawes was the Manchurian crisis. Appointed by Secretary of State Stimson to work with the League of Nations, he was given full discretion as to whether to sit with the League Council or work separately while cooperating with League policy. He explains at length his refusal to sit with the Council and convinced the Secretary of State that such a procedure was most advantageous. Whether he convinces the reader will depend somewhat upon the reader's attitude towards the League. Prentiss Gilbert, who preceded Dawes, knew the League far more intimately and found it more useful to sit with the League Council.

Dawes does not pay much attention to diplomatic practice as such, although he becomes sarcastic over the publication of confidential correspondence between the Embassy and the State Department regarding the making of the London Treaty. He pays his respects to parliamentary bodies in general in relation to foreign affairs by characterizing them aptly as "breeding grounds for ingenious and imaginative deviltry and international demagoguery."

The value of the volume is enhanced by 85 excellent illustrations, which include practically all of the political celebrities with whom Ambassador Dawes had occasion to consult. The many intimate descriptions and anecdotes reveal the human side of this critical period of international diplomacy in a valuable and interesting way.

GRAHAM STUART

Principles and Problems of International Relations. By H. Arthur Steiner. New York: Harper & Bros., 1940. pp. xii, 835. Index. \$3.75.

The greatly increased interest in international relations in the United States has been attested by the appearance of a veritable flood of textbooks in the field during the past few years. Of these, Professor Steiner's contribution is among the most important. Taking as his frame of reference a world torn by the resurgence of power politics and a corresponding decline of rational action, the author proceeds on the assumption that this offers a good vantage point for "analyzing, appraising, and interpreting the complex phenomena of international politics." The book, however, is decidedly not a modern history text; it deals with principles, problems, policies, structure and forces, pleasantly reminiscent of the pattern so successfully followed by R. L. Buell in his *International Relations* a decade ago. On the other hand, the author cannot be charged with lecturing on navigation while the ship is sinking. He not only keys his entire work to the present crisis, but he de-

votes over a hundred pages to a keen analysis of recent European developments.

The teacher casting about for a suitable text in international relations might well chalk up the following points in favor of Mr. Steiner's work: (1) it is well written in a provocative, stimulating fashion; (2) it is fairly complete, covering the usual run of topics from nationalism and imperialism to foreign policy, international law, pacific settlement, war, armaments, economic problems, the League of Nations, and current political problems in Europe and Asia; (3) it is well arranged for text purposes with sections and paragraphs conveniently labelled for student consumption; (4) it contains a selected bibliography; and (5) it is realistically done with a proper emphasis on the interplay of history, sociology, psychology, economics, anthropology, law and politics in international relations.

Turning to the other side of the ledger—if one *must* criticize a splendid piece of work—several objections might possibly be advanced. In the first place, the reader will search in vain for a discussion of the Latin American region, and students, no doubt, will be disappointed that special emphasis is not focused upon the all-important question "What about the rôle of the United States in world affairs?" Furthermore, such topics as neutrality, public opinion, geography and population might well have received more attention. Finally, the serviceableness of the book would be considerably enhanced by the inclusion of additional maps, graphs, charts and selected documentary materials. But these are relatively minor criticisms—perhaps largely a question of available space, and students of international relations will ever differ as to the materials the ideal book should include. Professor Steiner is to be congratulated on producing a text that will undoubtedly become one of the leaders in the international field. FRANCIS O. WILCOX

The True Facts about the Expropriation of the Oil Companies' Properties in Mexico. By the Government of Mexico. Mexico City: 1940. pp. 271.
Expropriation in Mexico. The Facts and the Law. By Roscoe B. Gaither. New York: Morrow & Co., 1940. pp. xii, 204. Index. \$2.00.

The Mexican oil dispute is as old as the Mexican revolution. The seizure by Mexico of foreign oil properties in 1938, however, opened entirely new legal aspects. From that time onward there has been endless discussion of these issues not only by diplomats but by jurists also.

True Facts is, of course, a partisan publication in defense of the Mexican measures. It contains, in the main, a detailed reply to a series of pamphlets published by the Standard Oil Company of New Jersey and D. Richberg's *The Mexican Oil Seizure*, in which the expropriation measures were attacked as "illegal confiscation" and "denial of justice." The basic contention is that there is no rule in international law by which the expropriating state is obliged to indemnify a foreign owner. The evidence adduced, however, misses the point, as Mexico did not choose to appropriate the oil properties

by enacting general reform legislation pertaining to a whole class of Mexican and foreign owners alike, but seized by individual decree single pieces of foreign-owned property. There is no doubt as to the ensuing obligation to pay compensation under such circumstances. Once this is admitted, as the Mexican Government seems practically to do (cf. pp. 11 ff., 88, 263), one of the main remaining issues is what Mexico has to pay for, and, in particular, the question whether she has to pay for tangible property only or also for the companies' rights to exploit subsoil deposits. *True Facts*, in defending the decision of the Mexican Supreme Court which refused to consider these rights as "property", tries to show that under Mexican law these rights had always been regarded as valueless "expectancies" or "franchises." But whatever the Hispano-Mexican doctrine concerning the legal nature of subsoil rights may imply, Mexican practice itself contradicts these conclusions, because exclusive concessions had been granted to those who had performed "positive acts" of exploitation. There is no doubt that international law has always regarded such concession rights as valuable property rights.

Another important issue dealt with is whether there has been a violation of Mexican municipal law amounting to a "denial of justice" by Mexico. Here is where Roscoe B. Gaither's *Expropriation in Mexico* comes in. This study, it is true, is not intended to deal with international issues, but solely with the question whether Mexican municipal law has been violated during the expropriation procedure, and, moreover, reads more like a lawyer's brief for the companies' case. On the basis of an investigation of Mexican jurisdiction, in particular that of the Federal Supreme Court, the author charges the following violations of Mexican law: (1) no "public hearing" had been granted to the companies prior to the expropriation, and later there was no judicial confirmation of the expropriation measure; (2) the Supreme Court in its decision did not state that a reason of "public utility" warranting an expropriation really existed; (3) deferred payment of compensation was admitted though previous practice had declared unconstitutional the respective provision of the Mexican Expropriation Law; (4) the right to exploit the subsoil deposits was not included in the properties for which compensation was held due. Another writer has come to somewhat differing conclusions with respect to the problem of immediate or deferred payment (cf. Crawford, *Expropriation of Petroleum Companies in Mexico*, in U. S. Department of Commerce, Comparative Law Series, April, 1938, 105 ff.). But even if Gaither's interpretations are fully accepted, it remains questionable whether internal measures, once the courts have finally declared them to be in accordance with internal law, can constitute an international "denial of justice". It is at least doubtful whether positive international law warrants the conclusion that there is another appeal in cases where aliens have had the usual recourse to the local law and the highest municipal tribunal has finally interpreted the law of the land. This, however, has nothing to do with the obligation arising from expropriation as such, which is

not one of restitution as in the case of "denial of justice," but one of pecuniary compensation. Wanted: A theory of expropriation in international law as a distinct and separate legal institution.

JOHN H. HERZ

Diplomacy and the Borderlands. The Adams-Onís Treaty of 1819. By Philip Coolidge Brooks. Berkeley: University of California Press, 1939. pp. x, 262. Index. \$2.50.

This work makes a genuine contribution to the history of American diplomacy. The so-called "Florida Treaty" of 1819 has heretofore been presented as a "purchase," has been studied almost exclusively from United States archives, and has been narrowly viewed as almost entirely concerned with Florida. Dr. Brooks in this study depicts the wider story of United States negotiations with Spain of all the issues at stake between the two Powers. He has examined the "materials in Spain, France, and England as well as in the United States," but found the "rôle played by Spain has been the most neglected by historians" and therefore makes the story of the career of the Spanish Minister in Washington, Don Luis de Onís, "the core of this narrative." Dr. Brooks favors Professor Bemis' phrase, descriptive of the treaty, as "the Transcontinental Treaty," thus recognizing its inclusion of a settlement of the western boundary of the Louisiana Purchase; and a cession to the United States of Spain's claim to the Oregon country, in addition to the cession of the Floridas.

After delineating the background of the controversy between Spain and the United States, in the period following the Louisiana Purchase, the author details the territorial difficulties confronting the two nations, from the contiguous Floridas to the Pacific Northwest. Spain protested the validity of the Louisiana Purchase and emphatically repudiated any attempt to include West Florida within it. Due to the tremendous handicap of a war at home to repel a Napoleonic invasion, and wars of independence in the American colonies, Spain was in no position to present a strong front to the United States or even to maintain continuous negotiations. As the United States did not recognize the rival governments set up in Spain during the enforced exile of Ferdinand VII, the representatives of both nations were not officially accredited in Spain or at Washington. As a result little headway was made until President Monroe received the credentials of Luis de Onís, December 19, 1815, and George W. Erving was recognized as our Minister to Spain in August of the following year.

The ensuing period witnessed Monroe's vain efforts to wring concessions from the Spanish ministers Cevallos and Pizarro, with proposals and counter-proposals through the year 1817. Pizarro, it is shown, injected some activity into the negotiations and informed himself on the details of the history and geography of the region involved, including use of the famous report of Father Pichardo. Dr. Brooks also brings to light the neglected rôle of Francisco de Heredia, the expert under Pizarro, whose *Exposición* of Spanish-

American relations is deservedly described as a "great state paper." The advent of John Quincy Adams as Secretary of State opened the way for the real negotiations between two worthy diplomatic antagonists, with Onís revealed as a foeman worthy of crossing swords with the great American statesman. Dr. Brooks amply justifies his subtitle, "The Adams-Onís Treaty of 1819," in a full-length treatment of the complicated and long drawn out battle which ensued. Spain's relations with the other European Powers, especially Russia, France, and England, Jackson's invasion of East Florida and its repercussions, are set forth with a wealth of new detail. The long and quarrelsome interval between the approval of the treaty by the United States Senate, February 24, 1819, and its ultimate ratification and execution in 1821, provides an exciting climax to what Adams regarded as his greatest diplomatic triumph. On the other hand, the author clearly establishes the advantages won for Spain by Onís in the face of fearful odds, as the retention of Texas for Spain, the acquisition of territory beyond the 100 degree line of longitude west and north of the Red River, the removal of the Russian menace on the Pacific coast, release from the payment of American claims, and the restoration of harmonious relations with the United States. That Spain lost much of this, due to the successful revolt of Mexico in 1821, in no wise detracts from the luster of his performance.

All the older accounts of Spanish-American diplomatic relations in the borderland area are definitely superseded by this scholarly and thoughtful account of one of the cornerstone treaties in American history. On the mechanical side it has an excellent annotated bibliography, including maps. The printing, format, and proofreading are in keeping with the reputation of the University of California Press. The scholar, however, will be somewhat irked by the collection of the footnotes at the end of the chapters, separated from the text. There is an adequate index.

ARTHUR S. AITON

BRIEFER NOTICES

Why War? Essays and Addresses on War and Peace. By Nicholas Murray Butler. (New York and London: Charles Scribner's Sons, 1940. pp. xii, 323. \$2.50.) Dr. Butler's long experience in organized endeavor in behalf of world peace has led him to emphasize the necessity of convincing the leaders of public opinion, first, that to prevent war it is necessary for the world to unite to remove the causes of war; second, that "the minds of men must now be turned to such post-war settlement of those differences which have brought about hostilities as will pave the way to an orderly and peaceful world." The present collection is composed of addresses made to widely differing audiences, at commencement exercises, before meetings of business and scientific organizations, over the radio, and for the press. In all of them the underlying thought is to attack the causes of war at the roots and to eschew mere emotional outpourings against war which serve no practical purpose. Dr. Butler places agreement upon economic policies even before

territorial adjustment in a post-war world. Only when these policies are established will it be possible to approach the readjustment of national boundaries, the treatment of minorities and the reassignment of colonies and mandates. He recommends the adoption of the economic and monetary program of the Chatham House conference of 1935. Nor does the author fail to see that before any economic or political devices can succeed, "the rule of moral principle must first be restored." He emphasizes the necessity of returning to the task of world organization, and recommends that the United States take the initiative along the lines of the Joint Resolution of Congress passed June 24, 1910, by the unanimous vote in each House, calling upon the President to lead in such organization and for the protection of international security through the combined navies of the world. Unfortunately, the development of air power since 1910 has greatly complicated the problem of enforcement, and the combined navies of the world might now not be adequate to this task. These addresses by one of our leading educators and most experienced minds in the long struggle against world anarchy should be read by those who wish to comprehend in more than a superficial manner the problems of peace in a war-torn world. The last essay of the book, a New Year's Message, 1940, pronounces the issues to be of immediate concern to the people of the United States, a conclusion which has been amply justified by the march of events since that time.

ARTHUR K. KUHN

Die Völkerrechtliche Haftung. By Stefan Arató. (Budapest: Nyomatott Társ József, 1937. pp. 57.) This study of the theory of state responsibility does not make any significant contribution, but evidences analytical skill and some penetration. The author is concerned not with cases but with the theories of various European writers. He confines his attention to establishing what is a legally protected interest, and under what circumstances the doctrine of imputability can attribute liability to the state. This brings him to a study of the organs of the state, but he hardly touches the troublesome problem of when a minor official can be deemed a state organ and when not. He questions whether the state can be deemed liable for the acts of individuals from their inception (Oppenheim), even when the state is delinquent in not preventing or punishing the act. The author makes much of a supposed distinction between international delinquency and state liability, which to the reviewer adds confusion to the subject. But he is wise in examining closely the elusive conception of "state act," for certainly the state is responsible only for wrongs which can be attributed to it directly, though the measure of the reparation may be found in the loss originally inflicted by some individual who has established privity or some *vinculum juris* with the state.

EDWIN BORCHARD

La Doctrina del No-Reconocimiento de la Conquista en América. By Alberto Ostria Gutierrez. (Rio de Janeiro: Borsoi & Cia., 1938. pp. 161.) This interesting treatise upon the American doctrine of the non-recognition of the acquisition of territory by conquest was offered by the author for his admission to the Brazilian Bar Association. Senhor Ostria Gutierrez points out that the idea of condemnation of territorial gains by force is traditional in the New World, having had its roots in the principle of *uti possidetis* of 1810, in the resolution of the Panamá Congress called by Bolívar in 1826, in the Monroe Doctrine, and in the resolutions of various Latin American or inter-American assemblages. This doctrine gained juridical status when Ameri-

can states adopted the declaration of August 3, 1932, during the Chaco War between Bolivia and Paraguay. The next constructive step would be for the Powers signatory to that declaration to conclude a treaty providing for sanctions against a government that should violate the agreement. A valuable part of the present work is the circumstantial account of the development of the declaration of August 3, 1932.

La Técnica Consultiva en el Derecho de Gentes. By Mario Antelo. (Rosario: Universidad Nacional del Litoral, 1938. pp. 182.) This work by a professor of international law in the Argentine university named above is a brief summary of international cooperation covering a wide range of examples, from the "concert of princes" of ancient China to treaties adopted by European and American states after the European War of 1914. The author emphasizes the belief that the authority of international law derives essentially from common voluntary action by sovereign political entities in contrast to the imposition of a superior will as in the national state. Especially during the period following the Versailles Treaty does he find evidence of the incorporation of consultation for joint action as a recognized part of positive international law. He cites the agreement to consult adopted by American states at the Buenos Aires conference in 1936 as an earnest of the growth of Pan American solidarity. Despite the flagrant violations of international law and the triumph of force in various parts of the world at the time Dr. Antelo was writing, he declares hopefully that it is his belief that the forces of reaction are always strongest during times of momentous change, as if they were intended to moderate the very brusqueness of change and to contribute toward creating an equilibrium between the old and the new order.

FREDERIC WILLIAM GANZERT

Shanghai and Tientsin, with Special Reference to Foreign Interests. By F. C. Jones. (New York: American Council, Institute of Pacific Relations, 1940. pp. xxx, 182. \$2.00.) Shanghai and Tientsin have long been the most important centers of foreign interests in China. The study prepared by Mr. F. C. Jones with the assistance of members of the Royal Institute of International Affairs is one of the publications sponsored by the Institute of Pacific Relations. It constitutes a brief, informational survey of foreign interests in these two cities. Each city is dealt with separately. The origin, legal status and development of the foreign settlements and concessions in these ports are traced, and the relation between foreign interests in these cities and the national interest of China is explained. There are valuable chapters in each section on the effects of the Sino-Japanese hostilities on foreign interests. The introduction written by Professor Vinacke indicates a line of further investigation which should be pursued, if the ramifications of foreign rights and interests in these two cities are to be thoroughly studied. This work should prove very useful for reference by all who are interested in the rapidly changing situation in China.

WM. C. JOHNSTONE

La Nationalisation et le Contrôle des Usines de Guerre. By A. Bigant. 2d. ed. (Paris: Éditions Domat-Montchrestien, 1939. pp. iv, 231.) This book describes the terms and the operation of the law of August 11, 1936, which provided for close government control of all munitions manufacturing and trade, for government participation in stock ownership of munitions companies, and for a period of seven months during which the government might expropriate such companies. The chief reason alleged for the enactment of the law was the evils of the munitions traffic (of which the author deems

French producers to be innocent), which had been recognized by a series of treaties including Brussels, Versailles, St. Germain, and by the Disarmament Conference. The author feels that the sponsors of the law confused the munitions trader with the innocent manufacturer. The law itself was hastily drawn and its provisions vague, leaving interpretation to decrees, and expropriation terms to arbitrators. Fortunately the decrees were more carefully drafted than the law, the arbitrators were fair, and relatively few plants were expropriated. But these conditions could not offset the alleged violations of the common law involved in the expropriation proceedings. The book shows graphically the difficulties inherent in taking industrial property for public use by payment of an indemnity. It was published before the debacle of the French army; the author did not, however, consider that nationalization had seriously curtailed the production of aircraft, as was later alleged.

HAROLD J. TOBIN

The Economic Causes of War. By Lionel Robbins. (London: Jonathan Cape, 1939. pp. 124. 5s.) Although he approaches the problem of war from a wholly different angle, Lionel Robbins reaches much the same conclusion as Bryce Wood in regard to its cause and cure. (See review, *ante*, p. 762.) Robbins' approach is that of the classical economist. The body of the book is devoted to a critical examination of the various theories which have attributed primary importance to the economic causes of war. The interpretations of the Marxian doctrine of imperialism by Roša Luxemburg, J. A. Hobson, Bukharin, Kautsky, Lenin and Marx himself are examined and found wanting. The author's constructive analysis of the causes of war reduces economic phenomena to a minor rôle. This analysis, however, only emphasizes that the root cause of war lies in "the existence of independent national sovereignties. Not capitalism, but the anarchic political organization of the world is the root disease of our civilization" (p. 99). The author's scholarly criticism of widely propagandized theories about the causes of war should be read by publicists and historians who have been far more free in attributing war to economic causes than have the economists. In an interesting appendix the author discusses the meaning of economic causation with the somewhat unsatisfactory conclusion that an economic objective is a "way of securing means of satisfying ends in general" (p. 117). The same might equally be said of a political objective.

QUINCY WRIGHT

La Représentation des Intérêts Économiques dans les Organismes Internationaux. By Ou Tsong Fen. (Paris: Les Éditions Domat-Montchrestien, 1940. pp. 136. Bibliography.) Dr. Fen develops the thesis that a variety of international economic organizations, such as the International Chamber of Commerce, the International Institute of Agriculture and numerous cartels, seek the same ideal, namely, the rationalization of the international economy. He contends that cartels perform a certain usefulness by the correlation of production and consumption, reduction of transportation and distribution costs, stabilization of prices, maintenance of reserve stocks of products, and the facilitation of the natural flow of commerce among nations. He advocates an international economic council, the organization of which resembles that of the International Labor Organization. Dr. Fen does not present a detailed plan of apportioning representatives to the periodical conference. He does insist that the organization should be representative of national and all economic interests, including industry, commerce, agriculture, credit, labor and consumers. The monograph shows

an understanding of the inter-relation between problems of debts, exchange, raw materials and tariffs, which makes them separately insolvable. The lengthy discussion of the development of national economic councils to coördinate diverse national economic forces overlooks the failure of several of these agencies to fulfill their purpose, but is otherwise a useful analysis.

The Economic Basis of a Durable Peace. By J. E. Meade. (New York: Oxford University Press, 1940. pp. 192. Index. \$2.00.) Mr. Meade, who prepares the noted *World Economic Survey* published annually by the League of Nations, here proposes an "International Organization" with authority to prevent foreign trade practices from degenerating into chaotic and unregulated warfare. The object of his plan is to place international trade upon a basis which will be mutually beneficial to all concerned by enabling each country to purchase its requirements where they can be obtained most cheaply and to sell its products in the markets where consumers are offering the highest prices. The proposed "International Organization," would combine the functions of a central bank of issue, an exchange equalization board, and a fair trade commission. An "International Bank" would control the supply and movements of money, and the value of each country's currency in terms of an international monetary standard. An "International Authority" would arrange for gradual reduction of barriers to trade, and would also supervise international cartels in the interest of consumers as well as producers of various raw materials. This plan has been designed along flexible lines, with the intention of leaving as much freedom as possible to the member states, and with a view to enabling states of divergent economic policies and structures to take part in the "Organization." Mr. Meade recognizes that difficulties may be expected to arise with respect to control of such domestically vital factors as population increases, population movements, industrial production and national public expenditure, not to mention private expenditure. He deems international control of these important matters necessary—yet he does not offer a plan for their solution which states might voluntarily be expected to accept, even at the end of a destructive war.

MONTELL OGDON

La Responsabilité Civile dans les Transports Aériens Intérieurs et Internationaux. By Jean Van Houtte. (Louvain: Société d'Études Morales, Sociales et Juridiques; Paris: Librairie Générale de Droit et de Jurisprudence, 1940. pp. 224. Index. 60 fr. belges; 12 belgas.) The subject selected by the Law Faculty of Northwestern University in the 1936 competition for the Linthicum Prize was "Carrier Liability in National and International Air Commerce." Of nine manuscripts submitted, Professor Van Houtte's was adjudged the best. The exposition is perspicuous, the point of view urbane. The method is to treat the several branches of the subject from the point of view of national law, to examine the rules adopted in the conventions of Warsaw (1929) and Rome (1933) (published as appendices) for the cases coming within their purview, and to consider the standard contracts actually used by the more important carriers. With an eye to sound development, the author suggests solutions which would do justice to the various sorts of victims without crippling aviation—which, at the time he wrote, seemed to increase man's resources for good. It is always difficult for the stranger to make himself at home with the various common law jurisdictions. In this Professor Van Houtte has been more than ordinarily successful. But to say, on the authority of a single case¹ in a federal court, that "*en droit anglo-*

¹ *Curtiss-Wright Flying Service v. Glose* (1933), 66 Fed. (2d) 710.

saxon" the common carrier cannot limit liability (p. 103) fails to give adequate expression to the fact that the courts of New York² and of England³ do not in this matter accept the doctrine of public policy generally professed in this country.

CHARLES FAIRMAN

Transactions of the Grotius Society. Vol. 25. Papers read in 1939. (London: Sweet & Maxwell, 1940. pp. xxxii, 296. Index, Vols. I-XXV. 10s.) This volume contains articles on "A Commonwealth of European States" by Dr. W. R. Bisschop; "The History and Outlines of Greek Maritime Law" by Professor P. L. Perdicás; "Is International Law Part of the Law of England" by Prof. H. Lauterpacht; "Custom and Muslim Law in British India" by Sir George Rankin; "A Comparison between English and French Administrative Law" by Dr. C. A. Colliard; "The Reform of the Permanent Court of International Justice" by Dr. Ed. Reut-Nicolussi; "Custom and Muslim Law in the Netherlands East Indies" by Professor Dr. H. Westra; "Le Développement du Droit des Gens dans le Nouveau-Monde" by Dr. Alejandro Alvarez; and the "Creation and Application of the Mandate System" by James C. Hales. While it may be imagination on my part, I had the feeling, while reading these articles, that the work of the Grotius Society, like so many other organizations, has been profoundly affected by the outbreak of another world war. There seems to be a sense of uncertainty in respect of this volume which was not present in earlier volumes. It is always a questionable procedure to select certain articles in a collection of this kind for special mention, but I personally found those of Dr. Lauterpacht, Dr. Colliard, Dr. Alvarez and Mr. Hales particularly interesting. Dr. Bisschop's article is a useful contribution to the literature on "World Federation," but the possibilities of realizing anything of this kind are so dependent upon the outcome of the war, that it is difficult to give the matter serious consideration at the present time. The article by Dr. Reut-Nicolussi on the reform of the Permanent Court is stimulating and suggestive, but I doubt if his proposals are feasible or would improve the working of that body. Human nature being what it is, the present arrangements for electing the members of the court are probably as satisfactory as any that can be devised. Dr. Alvarez rightly emphasizes the sanctity of international personality in his article, for if international law is to have any reality, this must be a basic underlying principle. The Grotius Society and the authors of these articles are to be commended for continuing their efforts under such trying conditions.

NORMAN MACKENZIE

Turkey at the Straits. By James T. Shotwell and Francis Deák. (New York: Macmillan Co., 1940. pp. xiv, 196. Index. \$2.00.) The text of the first part of this short monograph, through the Congress of Berlin, is drawn from a memorandum prepared in 1918 as part of the documentation of the American Commission to Negotiate Peace at the Paris Peace Confer-

² Cf. *Conklin v. Canadian-Colonial Airways* (1935), 266 N. Y. 244.

³ Cf. *Parker v. South Eastern Railway* (1877), 2 C. P. D. 416; *Thompson v. L. M. and S. Ry. Co.*, [1930] 1 K. B. 41. While it was not necessary to decide, it is clearly implied in the following judgments that the principles relating to the common carrier's liability are applicable to common carriers by air: *Alsan v. Imperial Airways* (1933), 49 T. L. R. 415; *Grein v. Imperial Airways* (1935), 52 T. L. R. 28 (reversed as to the interpretation of the Convention of Warsaw by the Court of Appeal, [1937] 1 K. B. 50); *Fosbrooke-Hobbes v. Airwork* (1936), 53 T. L. R. 254.

ence (p. ix). It shows no signs of having been revised in the light of subsequent research—particularly that published by Vernon Puryear and Harold Temperley. The second part of the work is more solid and informative. It includes an excellent summary of pre-World War diplomacy relating to the Straits, based upon documents published, for the most part, since the World War. The final part, dealing with the post-war conferences on the Straits, is disappointing in that it deals primarily with the interpretation of convention clauses and tells little about the underlying economic strategic changes in the Near East that find expression in the grand strategy of the Straits Question. Excerpts from the Treaty of 1920 and the Conventions of 1923 and 1936 governing the Straits are supplied. The bibliography is inadequate. The contribution of this work is limited. It is, roughly, a good article on the development of the Eastern Question from 1878 to 1919.

GEORGE NEBOLSINE

North Pacific Fisheries, with Special Reference to Alaska Salmon. By Homer E. Gregory and Kathleen Barnes. (San Francisco, New York, Honolulu: American Council, Institute of Pacific Relations, 1939. pp. xviii, 322. Index. \$3.00.) The technological advances in the fishing industry which made it possible for Japanese floating canneries to operate in Bristol Bay off the coast of Alaska well outside generally recognized territorial limits brought a clear threat to an important natural resource, the exploitation of which in those waters had previously been enjoyed exclusively by Americans. One by-product of the resulting controversy was this excellent study. As the subtitle suggests, the book is concerned with only the North American North Pacific fisheries, and, among them, primarily with the salmon fisheries. There is, however, a chapter on the halibut fisheries emphasizing the American-Canadian joint effort at conservation, and incidental reference to other commercial fisheries. The salmon fisheries, which overshadow all the others in importance, are examined in detail: the habits, species, and utilization of the fish; conservation measures—Federal, State, Dominion, interstate, and international; and the organization, financing, labor problems, and interrelationship of each of the three levels of the industry—fishing, processing, and marketing. Special attention is given to the Alaskan fisheries, to the consequences of their frontier environment, their remoteness, and their seasonal character, and to the dominant place they occupy in Alaskan economy. Throughout the volume the fact is stressed that "the basic problem" is "the supply of fish." This supply is now potentially threatened by "alien exploitation." This study furnishes not only a picture of an important industry, but also the background for the diplomatic and legal problems raised by that threat. A. P. DAGGETT

Japan's Case Examined. By Westel W. Willoughby. (Baltimore: The Johns Hopkins Press, 1940. pp. x, 237. Index. \$2.50.) Professor Willoughby examines Japan's "pleas in justification" for its actions in China: self-defense, superiority of culture and therefore of rights, vital interests, the danger of Communism, anti-Japanese feeling in China, and Chinese lack of political organization. He rejects them all, in certain instances by denial of premises, in others on grounds of law, morals or logic. Though the treatment of the several "pleas" is brief, the writer's authority and lucid style combine to present a strong rebuttal. Another section of the work is devoted to analysis of Japan's avowed aims as contrasted with its "pleas in justification." The author is able to show by Japan's acts and official

statements that the subjugation of China has been a developing program since 1914. His succinct review of the primary documents embodying Japanese demands and claims embodies also the reactions thereto of the United States and Great Britain. The remainder of the book is composed of chapters on "Japan's Monroe Doctrine"—which the author finds in contrast with its alleged prototype—Pan-Asia as Japan may view it, the "Tanaka Memorial," "Far Eastern Policies of the United States," and "The Significance to the World of the Conflict in the Far East." There are eight documentary appendices.

HAROLD S. QUIGLEY

Nederlands Onzijdigheid. Grondslagen en Gevolgen. By B. M. Telders. (The Hague: Martinus Nijhoff, 1939. pp. viii, 74. Gld. 0.80.) This pamphlet contains a collection of three essays by the professor of international law at Leiden University on "Netherlands Right to Neutrality," "The Neutrality Proclamation of 1939," and "The Commercial War and the Right of Neutrals." In the first essay Professor Telders seeks to prove that neutrality in European conflicts is not alone the right of the Netherlands but her highest duty. This right and duty, according to the argument, rests on the task which the Netherlands is called upon to fulfill in the European state-system, and without which the continuation of the Netherlands as an independent state would be unthinkable because impossible. The argument is powerful, but it nevertheless proved too frail to stand up against the overwhelming movements of the present war. The second essay is of some value in explaining one or two provisions in the Netherlands neutrality proclamation of 1939, and the third restates the traditional position on neutral rights.

A. VANDENBOSCH

Le Statut Juridique Actuel des Portes Maritimes Orientales de la Méditerranée (Les Détroits—Le Canal de Suez). By Faruk N. Berkol. (Paris: Recueil Sirey, 1940. pp. 496.) The author of this volume sets out to trace the development of the régimes governing the Bosphorus and Dardanelles (pp. 13-268) and the Suez Canal (pp. 269-476) from ancient times through the Convention of Montreux of 1936 and the recent demand by Italy for participation in the control of the Suez Canal. The author's purpose (p. 10) is to examine these problems as an historian and as a jurist. The result, however, proves to be largely a narration of the steps by which the various régimes were established, with but faint effort to probe the forces dictating the adoption of those régimes. Discussion of legal problems remains incidental and calls forth no extensive consideration of the general international law regulating straits and canals, of the problems raised by claims of states not parties to the conventions under examination, or, with the exception of the Convention of Constantinople of 1888 concerning the Suez Canal, of the application of those conventions. Apart from the discussion of the legal character of the Suez Canal Company and its rights in French and Egyptian law, and the legal rights of the Egyptian Government by decrees, by the above-mentioned convention and by the Anglo-Egyptian Treaty of 1936 (pp. 312-338), the reviewer is compelled to doubt whether the volume, although generally clear and concise, contributes appreciably to the labors already achieved in these fields by other writers upon whom the author appears to have heavily relied. In this last respect the use of secondary materials is particularly apparent in the analysis of the Montreux Convention (pp. 216-245), which would seem to constitute in large part a paraphrase of an article by Colliard in the *Revue de Droit International* (Paris), 1936, Vol. 18, pp. 121-152.

JOHN H. SPENCER

Commonwealth or Anarchy? A Survey of Projects of Peace from the Sixteenth to the Twentieth Century. By Sir John A. R. Marriott. (New York: Columbia University Press; London: Oxford University Press, 1939. pp. 227. Index. \$2.00.) The primary object of this volume is to put in convenient form the more important "Projects" which, during the last four centuries, have been formulated for the avoidance of international war. History is recorded in documents. How soon international wars will add to the collection no one is wise or foolhardy enough to say. These efforts from the sixteenth century to the twentieth may well require the last full strength of political society in this century. With those "Projects of Peace" this book deals, more particularly with the projects formulated by the Abbé de Saint-Pierre, Rousseau, Jeremy Bentham and Immanuel Kant; with the Holy Alliance of 1815, and the Covenant of the League of Nations. Marriott points out that the great war periods and the ensuing projects of peace came at regular intervals of a century. From Henry IV of France to Wilson, Hitler, Churchill and Pétain, the centuries stalk by. What covenant of peace is now to be?

CHARLES W. PIPKIN

Balkan Union. A Road to Peace in Southeastern Europe. By Theodore I. Geshkoff. (New York: Columbia University Press, 1940. pp. xvi, 345. Index. \$3.00.) This is the third book published in this country on the Balkan Conferences and Entente. The merits of this book lie in tracing in some detail trends toward collaboration in the Balkans "since antiquity," and in elaborating Bulgarian views regarding the conferences and Entente of the 1930's. Sidelights on the Bulgarian position are provided by reference to the Bulgarian press, and papers of Bulgarian statesmen. The deliberations and work of the conferences and the inter-Balkan institutions sponsored by them are treated only in "broad summary" and add nothing to previous works, notwithstanding the author's labored effort to footnote apparently everything published by the conferences and secretariat. The influence of the power politics of the great Powers upon the developments in the peninsula is virtually ignored. The significance of the Greco-Turkish *rapprochement* is not brought out fully, and the author belittles the activities and interests of statesmen other than Bulgarian and Greek. The analysis of the Balkan Entente is partial and commonplace. While the last conference was held in 1936, various institutions started by the conferences have carried on, and the Entente has continued to exist and to meet. The reader is entitled to expect the treatment to come up to date, through the crucial years since 1936. Nevertheless, the author concludes his study, to all intents, at the same point of time as did Kerner and Howard, and the reviewer, in their books published in 1936. The book ends with but a brief evaluation of the events treated, and of their place in a trend toward union or disparity in the Balkans and in Europe generally.

NORMAN J. PADELFORD

Trade Agreements: A Study in Democratic Methods. By John Day Larkin. (New York: Columbia University Press, 1940. pp. xii, 135. Index. \$1.00.) The author has made no small contribution to the subject of administration in contrasting the methods used by the interdepartmental committees in the framing of trade agreements with those employed in the construction of tariff acts in Congress. The information upon which the administrative committees base their action is more reliably compiled and receives more serious consideration than that which is presented by the representatives of special interests in the hearings of Congressional com-

mittees. Perhaps "expert" rather than "democratic" is the proper adjective to describe this administrative process. At any rate the author demonstrates that in the construction of trade agreements greater effort is made to consider the entire national interest than is shown in the framing of tariff schedules by Congress.

BENJAMIN H. WILLIAMS

England under George I. The Quadruple Alliance. By Wolfgang Michael. Translated by Annemarie and George E. MacGregor. (London: Macmillan, 1939. pp. 347. Index. \$7.00.) This second part of the second volume of Professor Michael's *Englische Geschichte im achtzehnten Jahrhundert* was published in 1920, with the subtitle "The Age of Walpole." The first volume of the competent, abbreviated translation of the magistral work, under the general editorship of Professor L. B. Namier, appeared in 1936; more are to follow. "The Quadruple Alliance" covers the period from the collapse of Whig party unity with the dismissal of Townshend and Walpole in April, 1717, to its restoration with their reappointment in May, 1720, during which time English foreign policy guided European destinies. Of special interest to the student of international politics are the chapters dealing with the negotiation and functioning of the Quadruple Alliance, the English activities in the Baltic, and the efforts of foreign monarchs to further the cause of the Stuart Pretender. Many of the events narrated in the book in intimate detail have a modern flavor, as, for example, the English prompting the French to prosecute a vigorous war to preserve the balance against "the growing exorbitance of the Spanish power." The author has drawn freely upon continental archives, including those of Hanover, Berlin and Vienna, in addition to his full use of English sources. It would have been helpful had the translators included the prefatory remarks of the author, together with some comment upon their own procedure of adaptation. Professor Namier is to be commended for making available to those unable to use the original German edition this classic contribution to the literature on George I.

EDWARD GEORGE LEWIS

Anglo-Saxony and Its Tradition. By George Catlin. (New York: Macmillan Co., 1939. pp. xiv, 341. Index. \$3.00.) The rapid march of international affairs makes this book paradoxically both timely and outdated. Written on the eve of the war, assumptions and doubts have already been proved false, but its fundamental analysis of our common tradition and the problem of a world federation is still valid. These are the themes that the author considers with the belief that the Anglo-Saxon world provides a working model of federalism. It is common tradition that binds the parts together and this tradition is characterized by such factors as respect for personality, liberty, experiment, tolerance, accommodation in social method, democracy, federalism, moralism and public spirit. The book is divided into three parts. The first states the problem and makes the challenge. The second is entitled "Notes on the Anglo-Saxon Tradition" and discusses the development of the above-mentioned factors through the views of representative writers. The third part is a conclusion in an attempt to gather together the threads of thought. Whereas Part I contains the challenge of the book, Part II contains the meat of the discussion, and Part III provides an element of integration of which the book itself seems in need. Whatever integration it has would seem to be inherent in the theme itself rather than in the treatment which one would expect to be the promise of the book. Another serious defect is a cumbersome literary

style. Much too often—and especially in Part I—the author attempts to crowd controversial asides within a simple sentence. This has the effect of making long sentences cluttered with subordinate ideas that obscure the main thought. And yet this book is not to be ignored for it is both purposeful and stimulating.

The Lady of the Holy Alliance. The Life of Julie de Krüdener. By Ernest John Knapton. (New York: Columbia University Press, 1939. pp. xiv, 262. Ill. Index. \$3.00.) The reader who looks to this volume for a study of the diplomatic events of the Holy Alliance will meet disappointment. With the exception of one chapter, there is little concerning this nineteenth-century covenant. If, however, the reader seeks to follow the social currents of an age as traced in the biography of an unusual woman, he will be richly rewarded through a study of *The Lady of the Holy Alliance*. This is the promise the author gives in his preface and it is more than adequately met. Mr. Knapton shows a thorough grasp of his subject, and careful scholarship. This is revealed through a painstaking search of whatever would throw light upon his study. Though his footnotes are numerous, it is more than mere documentation, for the author shows a discriminatory use of his materials in the best tradition of historical writing. Apart from the historical importance of Mme. de Krüdener's rôle, which the author fairly doubts, this biography is rich in human interest and enjoyably presented in a simple and clear style.

LIONEL H. LAING

Mobilizing Civilian America. By Harold J. Tobin and Percy W. Bidwell. (New York: Council on Foreign Relations, 1940. pp. xii, 276. Index. \$2.75.) This book throws a good deal of light on problems that for months have been engaging the attention of Congress and perplexing the American people. At the beginning of the War of 1914–1918 the slogan, "Business as usual," was current in England, but it soon became obvious that war was the one business to which all others must be adjusted. In time of war, or even in developing such preparedness as may make war unlikely, civilian America must be mobilized, so that the armed forces may have full equipment—arms, ammunition, airplanes, and so that, first, shipyards and then ships may be built to complete the "two-ocean navy" now authorized. All this must be done with as little disturbance as possible to the normal industrial life of the country. Under the authority of the National Defense Act of 1920, the Army and Navy authorities brought out plans which have been reviewed by the War Policies Commission, by committees of Congress and by the War Resources Board created by the President in January, 1939. Revised and again revised after such advice, the fourth edition of the Industrial Mobilization Plan was published later in 1939. This book is not only a careful review of the processes by which the plan was developed, but also a critical examination of its proposals. There is necessary discussion of such subjects as price control, tax on profits, possible commandeering of industrial plants, conscription of men for military and industrial service, and other related subjects which are now engaging the attention of America. The book is a timely study of important questions by competent men.

H. W. TEMPLE

BOOKS RECEIVED *

- Clyde, Paul Hibbert. *United States Policy Toward China*. Diplomatic and Public Documents 1839-1939. Durham: Duke University Press, 1940. pp. xvi, 321. \$3.50.
- Corwin, Edward S. *The President: Office and Powers*. History and Analysis of Practice and Opinion. New York: New York University Press; London: Humphrey Milford, Oxford University Press, 1940. pp. xiv, 476. Index. \$5.00.
- Einsig, Paul. *World Finance, 1939-1940*. New York: Macmillan Co., 1940. pp. 271. Index. \$2.75.
- Fraser, G. F. *Control of Aliens in the British Commonwealth of Nations*. London: Hogarth Press, 1940. pp. 304. Index. 12s. 6d.
- Friedman, Irving S. *British Relations with China: 1931-1939*. (I. P. R. Inquiry Series.) New York: International Secretariat, Institute of Pacific Relations, 1940. pp. xvi, 255. Index. \$2.00.
- German White Paper*. Full text of the Polish documents issued by the Berlin Foreign Office. New York: Howell, Soskin and Co., 1940. pp. 72. \$1.00.
- Guggenheim, Paul, and Pitman B. Potter. *The Science of International Relations, Law, and Organization*. (Geneva Studies, Vol. XI, No. 2.) Geneva: Geneva Research Centre, 1940. pp. 35. \$1.40; 1.75 Sw. Fr.
- Haas, William H. *The American Empire. A Study of the Outlying Territories of the United States*. Chicago: University of Chicago Press, 1940. pp. xii, 408. Index. \$4.00.
- Hozumi, Nobushige. *Ancestor-Worship and Japanese Law*. 6th ed. Revised by Shigetō Hozumi. Tokyo: Hokuseido Press, 1940. pp. xxxii, 205. Index. \$1.80; 6s.
- Kaackenbeeck, G. *Le Règlement conventionnel des Conséquences de Remaniements territoriaux*. Considérations suggérées par l'expérience de Haute-Silésie. Zurich: Éditions Polygraphiques, 1940. pp. 67. Fr. 3.
- Kunz, Josef L. *The Mexican Expropriations*. (Contemporary Law Pamphlets, Series 5, No. 1, International Law Series.) New York: New York University Law School, 1940. pp. ii, 64. \$1.00.
- Martin, Victor. *La Vie internationale dans la Grèce des Cités (VI-IV^e s. av. J.-C.)*. (Publications of the Graduate Institute of International Studies, Geneva, No. 21.) Paris: Recueil Sirey, 1940. pp. x, 633. Index. 11 Sw. Fr.
- McMahon, Matthew M. *Conquest and Modern International Law*. The Legal Limitations on the Acquisition of Territory by Conquest. Washington: Catholic University of America Press, 1940. pp. vi, 233. Index.
- Menefee, F. N. *The St. Lawrence Seaway*. Ann Arbor, Mich.: Edwards Brothers, Inc., 1940. pp. xvi, 325. Index. \$2.50.
- Myers, William Starr. *The Foreign Policies of Herbert Hoover*. New York and London: Charles Scribner's Sons, 1940. pp. xii, 259. Index. \$2.50.
- National Archives. Guide to Material in*. Washington: Government Printing Office, 1940. pp. xviii, 303. Index. \$1.40, paper-bound; \$1.70, cloth-bound.
- Sack, Alexander N. *Belligerent Recaptures in International Practice*. (Contemporary Law Pamphlets, Series 5, No. 2, International Law Series.) New York: New York University Law School, 1940. pp. ii, 40. \$1.00.
- Volwiler, Albert T. *The Correspondence between Benjamin Harrison and James G. Blaine, 1882-1893*. (Memoirs, Vol. XIV.) Philadelphia: American Philosophical Society, 1940. pp. xii, 314. Index. \$3.50.

* Mention here does not preclude a later review.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

AMERICAN BAR ASSOCIATION JOURNAL, August, 1940 (Vol. 26, No. 8). *Factual Aspects of our Foreign Affairs* (pp. 658-660), U. A. L.

———, September, 1940 (Vol. 26, No. 9). *The Significance of the Havana Meeting for the American Republics* (pp. 699-700), L. S. Rowe; *Need for a Center of Latin-American Legal Study* (pp. 705-708), J. T. Vance; *Inter-American Bar Association* (p. 741), W. C. Rigby; *Pan American Union* (pp. 745-746).

AMERICAN POLITICAL SCIENCE REVIEW, June, 1940 (Vol. 34, No. 3). *The Historical Meaning of the American Doctrine of Isolation* (pp. 539-547), A. K. Weinberg.

———, August, 1940 (Vol. 34, No. 4). *The British Dominions and Neutrality* (pp. 737-749), H. McD. Clokie.

CANADIAN BAR REVIEW, June, 1940 (Vol. 18, No. 6). *Conflict of Laws: Adoption under Foreign Lex Domicilii* (pp. 491-499), J. D. Falconbridge.

CULTURE (Sciences Religieuses et Sciences Profanes au Canada), June, 1940 (Vol. 5, No. 2). *Le Communautarisme Mondial d'Eméric Crucé (1823) et de Clarence K. Streit (1939)* (pp. 173-179), G. Poulin.

DANUBIAN REVIEW, June, 1940 (Vol. 8, No. 1). *The Principles of European Reconstruction* (pp. 1-4), A. Fell; *Hungary and East Central Europe* (pp. 5-18), F. Géza.

INTERNATIONAL LABOR REVIEW, July, 1940 (Vol. 42, No. 1). *The Use of Wireless Telegraphy at Sea for Medical Consultations* (pp. 29-46), R. Bernard and J. Haack.

KÜLTÜGYI SZEMLE, July, 1940 (Vol. 17, No. 4). *Húszéves Trianon* (pp. 287-290), J. Horváth; *Oroszország és a Balkán* (pp. 291-297), J. Pusztai-Popovits; *Japán és az Amerikai Egyesült Államok* (pp. 306-315), I. Kertész; *Bolsevizmus—Anti-Bolsevizmus, Belháború-Küldháború* (pp. 321-329), T. Huzella; *Különleges Katonai Repülésvállalkozások és a Nemzetközi Jog* (pp. 329-337), M. Kupa.

NEW YORK UNIVERSITY LAW QUARTERLY REVIEW, May, 1940 (Vol. 17, No. 4). *Arbitration in Admiralty* (pp. 573-602), G. H. Robinson; *The "Separability Doctrine" in American and Foreign Arbitration* (pp. 609-616), A. Nussbaum; *International Arbitration in the Americas* (pp. 617-624), G. Everett.

PACIFIC AFFAIRS, September, 1940 (Vol. 13, No. 3). *Netherlands India and Japan* (pp. 253-262), A. Vandenbosch; *Soviet Far Eastern Policy* (pp. 263-278), L. K. Rosinger.

REVISTA DE DERECHO INTERNACIONAL, December, 1939 (Vol. 36, No. 72). *Francisco de Vitoria y su Doctrina sobre la Ocupación y Conquista Coloniales* (pp. 145-169), F. Gasa; *Los Estados Unidos y las Ocupaciones Británicas en Centroamérica* (pp. 170-227), L. Anderson; *La Reforma del Pacto de la Sociedad de las Naciones y la Revisión de los Tratados de Paz* (pp. 228-246), A. Scrimali; *La Cooperación Económica Interamericana* (pp. 268-269), A. Linares Fleytas.

REVISTA DE LA FACULTAD DE CIENCIAS JURÍDICAS Y SOCIALES DE GUATEMALA, January-February, 1940 (Vol. 3, No. 2). *Propuesto Arbitraje de la Cuestión de Belice* (pp. 133-147); *Belice y los Ingleses* (pp. 163-172), S. Aguilar; *Irisarri y la Guerra de Secesión Americana* (pp. 173-178), J. Rodríguez Cerna.

REVUE DE DROIT INTERNATIONAL, DE SCIENCES DIPLOMATIQUES ET POLITIQUES, October-December, 1939 (Vol. 17, No. 4). *Un des Aspects de la Crise de la Société des Nations: Le Problème de l'Universalité* (pp. 260-268), R. Atabeki.

WORLD AFFAIRS INTERPRETER, July, 1940 (Vol. 11, No. 2). *Notes on Economic Foundations of Peace* (pp. 137-144), M. A. Heilperin; *Drang nach Osten* (pp. 145-158), M. Kybal; *American Foreign Policy* (pp. 159-178), C. A. Buss; *The Balkans: Key to World War II* (pp. 179-197), J. S. Roucek.

ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT, June, 1940 (Vol. 20, No. 2). *Der "anglo-amerikanische" und der kontinentale Kriegs- und Feindbegriff* (pp. 161-197), E. Menzel.

ELEANOR H. FINCH

INDEX

[Abbreviations: *BR*, book review; *BN*, book note; *CN*, current note; *Ed*, editorial comment; *JD*, judicial decision; *LA*, leading article.]

- Académie de Droit International. Recueil des Cours, 1938. *BR*. 357.
- Adams-Onís Treaty of 1819. Diplomacy and the Borderlands. P. C. Brooks. *BR*. 771.
- Administrative officers. Enforcement of treaties in United States. H. Reiff. *LA*. 601.
- Admiralty jurisdiction in Panama Canal Zone. 609.
- Aduana Vieja case. G. B.-Spain Mix. Cl. Com. *Cited*. 656, 658.
- Aërial law. Extent of aërial domain. A. K. Kuhn. *Ed*. 104.
- Aërial warfare. Flights over neutral territory. A. K. Kuhn. *Ed*. 104.
- African Slave Trade Agreement of 1890. United States failure to adopt legislation. 677.
- Agadir Crisis. I. C. Barlow. *BN*. 556.
- Agency in international law. A. P. Sereni. *LA*. 638.
- Agent, international. Staatsvertreter vor internationalen Schiedsgerichten. H. Rupp. *BR*. 757.
- Aggression. Neutrality and. Q. Wright. *LA*. 401.
- Status of United States in European war of 1939. E. Borchard, *Ed*, 696; C. Eagleton, *Ed*, 699; C. G. Fenwick, *Ed*, 693; Q. Wright, *Ed*, 685.
- Aggressor. 8th Int. Conf. Am. States on definition of. 715.
- Ago, Roberto. Esaurimento dei Ricorsi Interni in Tema di Responsabilità Internazionale, *BN*, 379; Studi di Diritto Internazionale, *BN*, 562.
- Air carriage. Van Houtte, La Responsabilité Civile dans les Transports Aériens Intérieurs et Internationaux. *BN*. 776.
- Air Power. Influence on International Relations. G. F. Eliot. *BN*. 375.
- Aircraft in Panama Canal Zone. N. J. Padelford. *LA*. 429, 631.
- Aircraft, military. Government traffic in. L. H. Woolsey. *Ed*. 498.
- Aiton, Arthur S. *BR*: Brooks, 771.
- Alabama claims arbitration. United States attitude regarding war vessels as contraband of war. 579, 695. *See also* Washington Treaty of 1871.
- Publication of diplomatic correspondence. R. R. Wilson. *Ed*. 508.
- Albania, international representation of. 638, 640, 641, 642, 646, 650, 655.
- Alcoholic liquor traffic in Panama Canal Zone. 620.
- Alexandretta, Sanjak of. Aspetti Giuridici del. G. Sperduti. *BN*. 562.
- Alfaro, Ricardo J. *BR*: Drago, 167.
- Almoguera v. United States. III Canal Zone Rep. 401. *Cited*. 608.
- Altmark, The. Norway's action in case of. E. Borchard. *Ed*. 289.
- America and the World Crisis. S. D. Myres, Jr. *BN*. 184.
- American Bar Association. Section of international and comparative law. 335.
- American Civil War. Interference with neutral mails, 316; precedents in prize law, A. M. McDiarmid, *LA*, 220.
- American Journal of International Law. Analytical index. 512.
- American Philosophical Society. Symposium on the Totalitarian State. *BN*. 557.
- American Republics:
- Consultative meeting, 1939. Q. Wright. *LA*. 245.
- Declaration on invasion of Belgium, Holland, and Luxemburg. 687.
- Resolutions on European possessions in America, 1940. P. C. Jessup. *Ed*. 704.
- American-Scandinavian Foundation. Appeal for Finland. 285.
- American Scientific Congress, Eighth. 128, 333, 493, 513.

- American Society of International Law. Annual meeting, 128, 332, 492; revision of Constitution, 326, 496.
- Amery, L. S. The German Colonial Claim. *BN*. 381.
- Anglo-Saxony and Its Tradition. G. Catlin. *BN*. 781.
- Annam. French protectorate over. 638, 640, 646.
- Antarctic in Western Hemisphere. 710.
- Antelo, Mario. La Técnica Consultiva en el Derecho de Gentes. *BN*. 774.
- Anzilotti, D. Corso di Diritto Internazionale. *Cited*. 639.
- Arabic Brotherhood treaty. *Cited*. 650.
- Arantzazu Mendi, The. [1939] A. C. 256. *Cited*. 47, 51.
- Arató, Stefan. Die Völkerrechtliche Haftung. *BN*. 773.
- Arbitral awards. Revision of. Sabotage claims against Germany. *JD*, 154; L. H. Woolsey, *LA*, 23.
- Arbitral tribunals, international. Staatsvertreter vor internationalen Schiedsgerichten. H. Rupp. *BR*. 757.
- Arbitration, international. Survey of, A. M. Stuyt, *BN*, 554; van Nederland, G. A. van Hamel, *BN*, 176.
- Arctic in Western Hemisphere. 710.
- Argentina. Attitude on Hague conventions provisions. 581.
- Armed merchantmen. E. Borchard. *Ed*. 107.
- Armed vessels, sending out of neutral ports. United States action in 1940, 575; Op. Atty. Gen., *JD*, 723; H. W. Briggs, *LA*, 575; rules of Treaty of Washington, 577; Hague Convention of 1907, 577; E. Borchard, *Ed*, 690; state practice, 581; Q. Wright, *Ed*, 680.
- Arms, ammunition and implements of war. Government traffic in. L. H. Woolsey. *Ed*. 498.
- Armstrong, Hamilton Fish. Can America Stay Neutral? *BR*. 373.
- Art collections. La Protection des Collections Nationales d'Art et d'Histoire. *BN*. 562.
- Asama Maru, The. Removal of enemy persons from. 249, 453.
- Asia, Northeastern. Selected Bibliography. R. J. Kerner. *BN*. 185.
- Austin's theory of international law criticized by Sir H. Maine. 411.
- Australia:
- Enemy alien problem. R. M. W. Kempner. *LA*. 448.
 - General Act for Pacific Settlement. Reservation as to disputes during war. 18.
 - P.C.I.J. Withdrawal of acceptance of Optional Clause. 16.
- Austria: Transition from Empire to Republic. D. F. Strong. *BR*. 370.
- Austria-Hungary-Serbia. Controversy over Serbian propaganda. 62.
- Azir. International representation of. 648.
- Bacon, Francis. Definition of war. 393.
- Baehr, Anton. Katholische Solidarität und Volksgemeinschaft. *BR*. 173.
- Bailey, Thomas A. A Diplomatic History of the American People. *BR*. 543.
- Balkan Union. Road to Peace in Southeastern Europe. T. I. Geshkoff. *BN*. 780.
- Balladore Pallieri, G. Studi di Diritto Internazionale. *BN*. 562.
- Baltic Entente. B. Kazlauskas. *BR*. 546.
- Balto, The. (1917) O. 79. *Cited*. 227.
- Banco de Bilbao v. Sancha and Rey. [1938] K. B. 176. *Cited*. 47, 51.
- Barlow, Ima C. The Agadir Crisis. *BN*. 556.
- Barnes, Kathleen. North Pacific Fisheries. *BN*. 778.
- Baumgarten, Arthur. Grundzüge der juristischen Methodenlehre. *BR*. 172.
- Bayard, Thomas F. Political address while Minister to Great Britain. 296.
- Bays, definition of. Stralla and Adams v. California. 98 Calif. 440. *JD*. 143.
- Baxter, James P., 3rd. *BR*: Dulles and Armstrong, 373.

Belgium:

Invasion by Germany in 1940. Declaration of American Republics, 687; statement of President Roosevelt, 688; termination of foreign diplomatic and consular representation, 310.

P.C.I.J. Reservation on withdrawals of acceptances of Optional Clause. 17.

Responsibility for international propaganda. 66, 67.

Belgium-Bulgaria. Electricity Co. of Sofia case. P.C.I.J. M. O. Hudson. *LA.* 5.

Belgium-Greece. Société Commerciale de Belgique case. P.C.I.J. M. O. Hudson. *LA.* 10.

Belize Question. Guatemala White Book. *BN.* 177.

Belmont v. United States. 301 U. S. 324. *Cited.* 681.

Beneš, Eduard. Democracy Today and Tomorrow. *BR.* 373.

Benson, Oliver. Origins of the War in Europe. *BN.* 382.

Berdahl, Clarence A. *BR:* Fenwick, 755; Olson, 537.

Berkol, Faruk N. Le Statut Juridique Actuel des Portes Maritimes Orientales de la Méditerranée. *BN.* 779.

Berlin Congress and After. W. N. Medlicott. *BN.* 376.

Bermuda, The. 3 Wallace 542. *Cited.* 222.

Bidwell, Percy W. Mobilizing Civilian America. *BN.* 782.

Bigant, A. La Nationalisation et le Contrôle des Usines de Guerre. *BN.* 774.

Bingham, Joseph W. Maritime jurisdiction in peace. *Ad.* 494.

Binney, Horace. Article on nationality laws cited. 45.

Black Tom case. *See* Sabotage cases, Germany-United States.

Blockade. World War and American Civil War precedents. A. M. McDiarmid. *LA.* 224, 231.

Boggs, S. W. Definition of Western Hemisphere. 709.

Bombs Bursting in Air. Influence of Air Power on International Relations. G. F. Eliot. *BN.* 375.

Bonds, foreign. Collecting on. J. Reuben Clark, Jr. *Ed.* 119.

Books received. 188, 384, 564, 783.

Borchard, Edwin. Altmark case, *Ed.* 289; armed merchantmen, *Ed.* 107; exchange of destroyers for naval bases, *Ed.* 690; Theodor Niemeyer, in memoriam, 334; quoted on neutrality, 394, 395; *BN:* Arató, 773, Rupp, 757.

Boycotts. Nationalboycott und Völkerrecht. G. A. Walz. *BN.* 179.

Briggs, Herbert W. *BR:* Hammarskjöld, 371, Kelsen, 758; neglected aspects of the destroyer deal, *LA.* 569; non-recognition of title by conquest, *Ad.* 494; relations officieuses and intent to recognize, *LA.* 47; removal of enemy persons from neutral vessels, *LA.* 249.

Brinton, Jasper Y. Egypt: The transition period. *LA.* 208.

Bristol Channel. British territorial waters. 150.

British Empire:

Development of, and the Dominions. Cecil J. B. Hurst. *Quoted.* 412, 413.

Enemy alien problem. R. M. W. Kempner. *LA.* 448.

British Nationality Law of 1915. R. W. Flournoy. *LA.* 37.

British subject. Palestine native not a. Rex v. Ketter. 55 T.L.R. 449. *JD.* 529.

Broadcasting, Television, etc., Performers' Rights in. *BN.* 555.

Brooking, W. T. The Wilhelmina case. 75, 80.

Brooks, Philip C. Diplomacy and the Borderlands. Adams-Onís Treaty of 1819. *BR.* 771.

Brown, Francis J. Contemporary World Politics. *BN.* 183.

Brown, Philip Marshall. *BN:* Mowat, 558; the Cardenas doctrine, *Ed.* 300; changing concepts of international law, *Ed.* 503; protective jurisdiction of Panama Declaration of 1939, *Ed.* 112.

- Brown case. Am. Br. Cl. Arb. Trib. *Cited.* 658.
- Bryan, William J. Attitude on armed merchantmen, 111; letter to Senator Stone, cited 220, 224.
- Bullock, A. L. C. Germany's Colonial Demands. *BN.* 381.
- Burdick, Charles K. *BR:* Rafuse, 368.
- Burlingham, Charles C. Letter on exchange of destroyers for naval bases. 578, 585, 682.
- Butler, Nicholas Murray. Why War? Essays and Addresses. *BN.* 772.
- Bynkershoek, C. van. Definitions of war and neutrality. 392, 393, 396, 501.
- California. Territorial waters. *Stralla and Adams v. California.* 98 Calif. 440. *JD.* 143.
- Call, Arthur D. *BN:* Newfang, 181; Saerchinger, 557.
- Callahan, J. M. *BN:* Lockey, 560; Reynolds, 183.
- Callières, Practice of Diplomacy. *Cited.* 296.
- Cambodia. International representation of. 640, 646, 650.
- Cameron Septic Tank Co. v. Knoxville. 227 U. S. 39. *Cited.* 671, 672.
- Canada:
- Embargo during American Civil War. 228.
 - Enemy alien problem. R. M. W. Kempner. *LA.* 448.
 - General Act for Pacific Settlement. Reservation as to disputes during war. 18.
 - P.C.I.J. Withdrawal of acceptance of Optional Clause. 16.
- Canal Zone v. Christian. I Canal Zone Sup. Ct. Rep. 3. *Cited.* 427.
- Canal Zone v. Coulson. I Canal Zone Sup. Ct. Rep. 54. *Cited.* 428.
- Capitulations in Egypt, abolition of. J. Y. Brinton. *LA.* 208.
- Capture, probable cause. Sudden & Christenson v. United States. *JD.* 737.
- Cardenas Doctrine. P. M. Brown. *Ed.* 300.
- Carol, Prince of Rumania. Expulsion from Great Britain. 67.
- Carpenter, Boyd. *BN:* Sastry, 561.
- Carr, Edward H. The Twenty Years' Crisis, 1919-1939. *BR.* 761.
- Carroll, Mitchell B. *BN:* Farnsworth, 179.
- Cartels. Die Kartellbindung bei internationalen Kartellen. G. Hofheinz. *BN.* 180.
- Carvalho, S.S. Removal of enemy persons from. 453.
- Catholic missions in China. Protectorates over. H. M. Cole. *LA.* 473.
- Catlin, George. Anglo-Saxony and Its Tradition. *BN.* 781.
- Central American Regional Radio Convention of 1938. *Cited.* 630.
- Chambers, Frank P. The War Behind the War, 1914-1918. *BR.* 171.
- Chapelaine, French priest murdered in China. 484, 489.
- Chesapeake Bay. Territorial waters of United States. 151.
- Children born abroad. Revision of United States nationality laws. R. W. Flournoy. *LA.* 41.
- Chile. Attitude on Hague Conventions provisions. 581.
- China:
- Catholic missions in. French protectorate over. H. M. Cole. *LA.* 473.
 - Government in Republican. P. M. A. Linebarger. *BN.* 184.
 - Sovereignty over leased territories in. G. G. Wilson. *Ed.* 703.
- China, The. Removal of enemy persons from. *Cited.* 233, 252, 254.
- China-France. Treaties of 1858 and 1860. H. M. Cole. *LA.* 486, 487.
- China-Great Britain. Treaty of 1860. H. M. Cole. *LA.* 487.
- China-Japan:
- Far Eastern policies of United States. W. W. Willoughby. *LA.* 193.
 - Hostilities of 1937 held to be war. K.K.K. v. Bantham S.S. Co., 55 T. L. R. 503, *JD.* 533; American aid, 202.
- Church and State in development of international law. G. Niemeyer. *LA.* 588.

- Churchill, Winston. Statement in 1915 regarding blockade of Germany. 77, 85.
 City of Flint, The. C. C. Hyde. *Ed.* 89.
 Civilized nations. Concetti nel Diritto Internazionale. M. Decleva. *BN.* 179.
 Claims, international. Nationality. Panevezys-Saldutiskis Ry. case. P.C.I.J. 1.
 Claims commissions. Reopening of awards. Sabotage cases. *JD*, 154; L. H. Woolsey, *LA*, 23.
 Clark, J. Reuben, Jr. Collecting on defaulted foreign dollar bonds. *Ed.* 119.
 Cock A., Alfredo. Tratado de Derecho Internacional Privado. *BN.* 554.
 Cole, H. M. French protectorate over Catholic missions in China. *LA.* 473.
 Colegrove, Kenneth. *BR*: Fujii, 553.
 Colonial Questions and Peace. E. Moresco. *BN.* 380.
 Colonies. German claims to. L. S. Amery, *BN*, 381; A. L. C. Bullock, *BN*, 381; G. Roberts, *BN*, 381; J. H. Schreiber, *BN*, 378.
 B. Wood. Peaceful Change and the Colonial Problem. *BR*: 762.
 Commerce and development of international law. G. Niemeyer. *LA.* 588.
 Commonwealth or Anarchy? J. A. R. Marriott. *BN.* 780.
 Compton, Lewis. Statement on sale of naval vessels to Great Britain. 570.
 Conception Bay. British territorial waters. 150.
 Confederate States of America. British relations with. 52.
 Congress of United States. Power to declare neutrality. Q. Wright. *Ed.* 302.
 Congressional Record. Failure to provide exchange copies. 677.
 Conquest. Gutierrez, La Doctrina del No-Reconocimiento de la. *BN.* 773.
 Consuls in insurgent territory. H. W. Briggs. *LA.* 48, 52, 54.
 Consuls, foreign, in occupied territory. E. C. Stowell. *Ed.* 310.
 Consultation. M. Antelo, La Técnica Consultiva en el Derecho de Gentes. *BN.* 774.
 Conte di Savoia, S.S. Removal of enemy persons from. 454.
 Continuous voyage. World War and American Civil War precedents. A. M. McDiarmid. *LA.* 223.
 Contraband of war:
 Government traffic in. L. H. Woolsey. *Ed.* 498.
 War vessels as. Op. Atty. Gen. *JD*, 723; H. W. Briggs, *LA*, 579; E. Borchard, *Ed.* 690;
 C. C. Hyde cited, 579; Q. Wright, *Ed.* 680.
 World War and American Civil War precedents. A. M. McDiarmid. *LA.* 220.
 Copyright conventions, Pan American. Non-enforcement of. 675.
 Corbett, P. E. *BR*: Deák and Jessup, 753.
 Corn Islands. United States lease of. 704.
 Corporations. Residence and Domicil of. A. Farnsworth. *BN.* 179.
 Costa Rica. Note to League of Nations on Monroe Doctrine. 707.
 Cracow. International representation of. 641, 648.
 Crane, Charles R. Recall of. 296.
 Crichton, John C. The Wilhelmina. *LA.* 74.
 Cromwell incident. E. C. Stowell. *Ed.* 294.
 Cunard S. S. Co. v. Mellon. 262 U. S. 100. *Cited.* 152.
 Curtiss-Wright Export Corp. v. United States. 299 U. S. 304. *Cited.* 309, 681, 690, 729.
 Customs charges in Panama Canal Zone. 430.
 Czechoslovakia. Responsibility for international propaganda. 68.
 Daggett, A. P. *BN*: Gregory and Barnes, 778.
 Dangerfield, Royden. *BN*: Haynes, 374.
 Danzig. International representation of. 641, 646, 654, 655, 660.
 Dart, Dorothy R. Chronicle of international events. 142, 336, 517, 717.
 Dawes, Charles G. Journal as Ambassador to Great Britain. *BR.* 767.

- Deák, Francis. Foreign Relations of Hungary, *BR*, 368; Neutrality Laws, Regulations and Treaties of Various Countries, *BR*, 753; Turkey at the Straits, *BN*, 777; quoted on neutrality, 392.
- D'Eca, Raul. Handbook of Latin American Studies, 1938. *BN*. 561.
- Decleva, Matteo. Concetti di "Civiltà" e di "Nazioni Civili". *BN*. 179.
- Delaware Bay. Territorial waters of United States. 149.
- Democracy and conduct of foreign affairs. DeTocqueville and E. Root. *Quoted*. 310.
- Democracy Today and Tomorrow. E. Beneš. *BR*. 373.
- Demurrage in requisition of neutral vessel. *Sudden & Christenson v. United States*. *JD*. 737.
- Denial of Justice, Responsibility of States for. A. V. Freeman. *BR*. 363.
- Denmark. Statement by President Roosevelt regarding German invasion in 1940. 688.
- Dictatorship in the Modern World. G. S. Ford. *BR*. 548.
- Diplomacy. H. Nicholson, *BN*, 177; and the Borderlands, Adams-Onís Treaty of 1819, P. C. Brooks, *BR*, 771.
- Diplomatic agents:
 In occupied territory. E. C. Stowell. *Ed*. 310.
 Laws protecting from libel. 70.
 Public speeches by. Cromwell incident. E. C. Stowell. *Ed*. 294.
- Diplomatic correspondence. Government consent to publication of. R. R. Wilson. *Ed*. 508.
- Diplomatic Correspondence of United States. Inter-American Affairs, 1831-1860. W. R. Manning. *BN*. 178.
- Diplomatic History of the American People. T. A. Bailey. *BR*. 543.
- Diplomatic privileges and immunities for agents of insurgent governments. H. W. Briggs. *LA*. 50.
- Diplomatic protection by third states. A. P. Sereni. *LA*. 638.
- Direct U. S. Cable Co. v. Anglo-American Tel. Co. L. R. [1877] 2 A. C. 394. *Cited*. 150.
- Divine law and international law. Rereading Grotius. D. V. Sandifer. *LA*. 459.
- D'Ormesson, Wladimir. France. *BN*. 377.
- Drago, Luis M. Discursos y Escritos. M. J. Drago. *BR*. 167.
- Dual nationality. United States laws. R. W. Flournoy. *LA*. 43.
- Dueling. Prohibition of. 407.
- Dulles, Allen W. Can America Stay Neutral? *BR*. 373.
- Dumbauld, Edward. *BR*: Ziegler, 542.
- Dynasties in the development of international law. G. Niemeyer. *LA*. 594.
- Eagleton, Clyde. Duty of impartiality on part of neutral, *Ed*, 99; interference with American mails, *Ed*, 315; needs of international law, *Ed*, 699; *BR*: Académie de Droit International, 357, Yepes and Pereira da Silva, 759.
- Earth and the State. D. Whittlesey. *BR*. 366.
- Ebenstein, William. Fascist Italy. *BN*. 378.
- Economic Basis of a Durable Peace. J. E. Meade. *BN*. 776.
- Economic Causes of War. L. Robbins. *BN*. 775.
- Economic organizations, international. O. T. Fen, La Représentation des Intérêts Économiques dans les Organismes Internationaux. *BN*. 775.
- Edna, S. S. *Sudden & Christenson v. United States*. Award, 737; Act for payment, 751.
- Egypt:
 Abolition of capitulations. J. Y. Brinton. *LA*. 208.
 Adherence to P.C.I.J., 13; and Optional clause, 14.
- Egypt-Great Britain. Alliance of 1936. J. Y. Brinton. *LA*. 208.
- Éire, neutrality of. R. R. Wilson. *Ed*. 125.
- Electricity Co. of Sofia and Bulgaria case. P.C.I.J. M. O. Hudson. *LA*. 5.

- Elg v. Perkins. 307 U. S. 325. *Cited.* 44.
 Eliot, George Fielding. Influence of Air Power on International Relations. *BN.* 375.
 Embargoes, belligerent, on neutral trade. World War and American Civil War precedents. A. M. McDiarmid. *LA.* 227.
 Enemy alien problem. R. M. W. Kempner. *LA.* 443.
 Enemy persons. Removal from neutral vessels. H. W. Briggs, *LA.* 249; R. M. W. Kempner, *LA.* 453; in World War and American Civil War, 233.
 England under George I. The Quadruple Alliance. W. Michael. *BN.* 781.
 English Navigation Laws. L. A. Harper. *BR.* 552.
 Error. Reopening of arbitral award. Sabotage cases. *JD.* 154; L. H. Woolsey, *LA.* 23.
 Estonia-Lithuania. Panevezys-Saldutiskis Ry. case. P.C.L.J. M. O. Hudson. *LA.* 1.
 Estonia-United States. American relations with unrecognized government, 1920. 54.
 Ethics and international law. H. J. Morgenthau. *LA.* 260.
 Ethiopia. British recognition of Italian conquest, 51; international representation of, 641, 650, 651.
 Europe. Grundfragen Europäischer Ordnung. G. Hahn. *BR.* 173.
 Europe, Western. A Federation for. W. I. Jennings. *BN.* 558.
 European Governments. The Background of. Hill and Stoke. *BN.* 559.
 European Governments and Politics. F. A. Ogg. *BN.* 559.
 European possessions in America. Monroe Doctrine in 1940. P. C. Jessup. *Ed.* 704.
 European states system in development of international law. G. Niemeyer. *LA.* 588.
 European War of 1939. British Case, *BN.* 382; Origins of, O. Benson, *BN.* 382; E. C. Stowell, *Ed.* 711.
 Evidence before International Tribunals. D. V. Sandifer. *BR.* 165.
 Reopening of arbitral award. Sabotage cases. *JD.* 154; L. H. Woolsey, *LA.* 27.
 Evidence in determining boundaries. Stralla and Adams v. California. 98 Calif. 440. *JD.* 143.
 Exchange of official documents and publications. Enforcement of conventions. 674.
 Executive agreements. Powers of the President under. Op. Atty. Gen., *JD.* 729; E. Borchard, *Ed.* 690; Q. Wright, *Ed.* 680.
 Expatriation of persons residing abroad. Revision of U. S. laws. R. W. Flou y. *LA.* 44.
 Expropriation of Oil Companies' Properties in Mexico. R. B. Gaither, *BR.* 769; Government of Mexico, *BR.* 769; cases in Mexican Supreme Court, A. K. Kuhn, *Ed.* 297.
 Extradition in Panama Canal Zone. 609.
 Extradition of Nationals. R. W. Rafuse. *BR.* 368.
 Extraterritoriality in China. British jurisdiction over foreigners. re Ning Yi-Ching. *JD.* 347.
 Ezra v. Lamont. 265 N. Y. 635. *Cited.* 354.
 Fairman, Charles. *BN:* Van Houtte, 776.
 Far East in World Politics. G. F. Hudson. *BN.* 377.
 Far Eastern policies of the United States. W. W. Willoughby. *LA.* 193.
 Farnsworth, A. The Residence and Domicil of Corporations. *BN.* 179.
 Fen, Ou Tsong. La Représentation des Intérêts Économiques dans les Organismes Internationaux. *BN.* 775.
 Fenwick, Charles G. American Neutrality: Trial and Failure, *BR.* 755; neutrality on the defensive, *Ed.* 697; Panama declaration of 1939, *Ed.* 116. *BN:* Brown, Hodges, Roucek, 183; Marshall, 182; Sharp and Kirk, 763.
 Ferdonnet, Paul. Broadcasting by. 454.
 Finch, Eleanor H. Periodical literature of international law. 191, 386, 567, 784.
 Finch, George A. 8th International Conference of American States, *CN.* 714; annual meeting of A.S.I.L., 332, 492.

- Finland. International law for. C. C. Hyde. *Ed.* 285.
- Fisheries, North Pacific, with Special Reference to Alaska Salmon. Gregory and Barnes. *BN.* 778.
- Flannery and Lorenz v. Government. III Canal Zone Rep. 595. *Cited.* 608, 620.
- Fleming, D. F. *BN:* Laves, 380; Salter, 380.
- Flournoy, Richard W. Revision of nationality laws of United States. *LA.* 36.
- Foodstuffs as contraband:
- The Wilhelmina. J. C. Crighton. *LA.* 74.
- World War and American Civil War precedents. A. M. McDiarmid. *LA.* 222.
- Ford, Guy Stanton. Dictatorship in the Modern World. *BR.* 548.
- Foreign affairs of United States. Power to declare neutrality. Q. Wright. *Ed.* 302.
- Foreign Bondholders Protective Council, work of. J. R. Clark, Jr. *Ed.* 119.
- Foreign Politics, Generalized. L. F. Richardson. *BN.* 383.
- Foreign Relations of the United States, 1924, *BR.* 756; Lansing Papers, 1914-1920, *BR.* 756.
- Fortification of Panama Canal. N. J. Padelford. *LA.* 635.
- France. W. D'Ormesson. *BN.* 377.
- Enemy alien problem. R. M. W. Kempner. *LA.* 449, 456.
- General Act for Pacific Settlement. Reservation as to disputes during war. 17.
- International propaganda. Decrees and practice. 60, 64, 65, 67, 71.
- Letter of President Roosevelt to Premier, June 15, 1940. 688.
- P.C.I.J. Withdrawal of acceptance of Optional Clause. 16.
- Protectorate over Catholic missions in China. H. M. Cole. *LA.* 473.
- France and Latin American Independence. W. S. Robertson. *BN.* 378.
- France-Spain. French relations with insurgent government of 1873. 53.
- Fraser, Henry S. *BR:* Harper, 552.
- Fraud. Reopening of arbitral award. Sabotage cases. *JD.* 154; L. H. Woolsey, *LA.* 30.
- Freeman, Alwyn V. International Responsibility of States for Denial of Justice. *BR.* 363.
- Fujii, Shinichi. Essentials of Japanese Constitutional Law. *BR.* 553.
- Functionalism, positivism, and international law. H. J. Morgenthau. *LA.* 260.
- Gaither, Roscoe B. Expropriation in Mexico. The Facts and the Law. *BR.* 769.
- Gantenbein, James W. Financial Questions in United States Foreign Policy. *BN.* 180.
- Ganzert, Frederic W. *BN:* Antelo, 774; Gutierrez, 773.
- Garner, James W. Memorial student loan fund. 513.
- General Act for Pacific Settlement of International Disputes. Reservations as to disputes during war. 17.
- Geography, political. The Earth and the State. D. Whittlesey. *BR.* 366.
- Gerard, Ambassador. Quoted on probable outcome of war in 1915. 81.
- Gerlicy case. P.C.I.J. M. O. Hudson. *LA.* 12.
- Germany:
- Colonial Claims. L. S. Amery, *BN.* 381; A. L. C. Bullock, *BN.* 381; G. Roberts, *BN.* 381; J.-H. Schreiber, *BN.* 378.
- Diplomatic and consular representation in invaded countries. E. C. Stowell. *Ed.* 310.
- Enemy alien problem. R. M. W. Kempner. *LA.* 443, 452.
- European War of 1939:
- The Case for Germany. A. P. Laurie. *BN.* 382.
- States which recognized Germany as aggressor. 689.
- Hitler's. K. Loewenstein, *BR.* 549; C. Santoro, *BR.* 549.
- International propaganda of National Socialist Government. 63-70.
- Propaganda in United States during World War. 86.
- National Socialism and enemy aliens abroad. R. M. W. Kempner. *LA.* 444.
- Nationality laws. R. W. Flournoy. *LA.* 36.

World War:

- Seizure of grain stocks. 76, 82, 85, 86; submarine warfare, origin of, 79.
 What Germany Forgot. J. T. Shotwell. *BR.* 540.
 Germany-Poland frontiers. Self-Determination, 1919. F. W. Kaltenbach. *BN.* 554.
 Germany-Russia. Sale of naval auxiliary vessels during war with Japan. 583, 684, 696, 736.
 Germany-United States:
 The City of Flint. C. C. Hyde. *Ed.* 89.
 Correspondence on termination of foreign representation in Belgium and Poland. 310.
 Notes exchanged on Monroe Doctrine, 1940. 708.
 Sabotage cases. *JD.* 154; L. H. Woolsey, *LA.* 23.
 Geshkoff, Theodore I. Balkan Union. *BN.* 780.
 Glitra, The. Sinking of. 79.
 Godshall, Wilson Leon. *BR.* Jones and Myers, 543; Problems of Peace and War, 185; Wiskemann, 556.
 Government traffic in contraband. L. H. Woolsey. *Ed.* 498. *See* Great Britain-United States, exchange of destroyers for naval bases.
 Graham, Malbone W. *BR.* Kaslauskas, 546; Loewenstein, 549; Santoro, 549.
 Grant, U. S. Message regarding transfer of Spanish dependencies. 705.
 Great Britain:
 Diversion of neutral merchantmen. C. Eagleton, *Ed.* 315; P. C. Jessup, *Ed.* 312.
 Enemy alien problem. R. M. W. Kempner. *LA.* 443, 456.
 Foreign Enlistment Act of 1870. 582.
 General Act for Pacific Settlement. Reservation as to disputes during war. 17.
 Neutrality and Pax Britannica. Q. Wright. *LA.* 410.
 P.C.I.J. Memo. on signature of Optional Clause, 16; withdrawal during war, 16.
 Responsibility for international propaganda. 64, 66, 67, 68, 71.
 Tientain, jurisdiction over foreigners in. In re Ning Yi-Ching. *JD.* 347.
 Washington Treaty of 1871. Acceptance of rules, 580, 584, 695; law on, 582.
 Great Britain-Japan. Diplomatic correspondence concerning China, 1938, 195; removal of enemy persons from Asama Maru, 249.
 Great Britain-Soviet Russia. Relations officieuses in 1920. 55.
 Great Britain-Spain. British recognition of Franco insurgent government. 47.
 Great Britain-United States:
 Alabama claims. Publication of correspondence. R. R. Wilson. *Ed.* 508.
 The American Entente. R. B. Mowat. *BN.* 558.
 Correspondence on interference with neutral mails. 315.
 Exchange of cotton and rubber. L. H. Woolsey. *Ed.* 499.
 Exchange of naval and air bases for destroyers. E. Borchard, *Ed.* 690; H. W. Briggs, *LA.* 569; Op. Atty. Gen., *JD.* 728; Q. Wright, *Ed.* 680.
 Panama Canal. American rights in, N. J. Padelford, *LA.* 416; Treaty of 1901, N. J. Padelford, *LA.* 417; tolls controversy, N. J. Padelford, *LA.* 603.
 Prize law in American Civil War and World War. A. M. McDiarmid. *LA.* 220.
 Proposed sale of torpedo boats in 1940. L. H. Woolsey. *Ed.* 499.
 Proposed sale of warships during war with Spain. 582, 684, 695.
 World War:
 Agreement of 1927 on American claims. Sudden & Christenson v. United States. *JD.* 737.
 Correspondence on diversion of merchantmen, 314, 315; on foodstuffs, 74; on interference with neutral mails, 315; on removal of enemy persons from neutral vessels, 252, 254.
 Greece. Acceptance of Optional Clause of P.C.I.J. 15.
 Green Commission Co. The Wilhelmina case. 74, 86.
 Greenland a part of Western Hemisphere. 710.

- Gregory, Homer E. North Pacific Fisheries. *BN*. 778.
- Gregory, T. W. Report on neutrality legislation. *Quoted*. 576, 586.
- Grew, Joseph C. Speech in Tokyo, Oct. 19, 1939. *Quoted*. 202.
- Grotius, De Jure Belli ac Pacis:
 Quoted on war and neutrality, 392, 398, 402, 407, 410.
 Rereading in 1940. D. V. Sandifer. *LA*. 459.
- Suarez and, in development of international law. G. Niemeyer. *LA*. 588.
- Grotius Society. Problems of Peace and War. *BN*. 185, 777.
- Guantanamo naval station. Acquisition by United States, 680, 692, 730; sovereignty in leased territory, 704.
- Guatemala White Book. Belize Question. *BN*. 177.
- Guerrero, J. G. Statement on P.C.I.J. and the war of 1939. 21.
- Gutierrez, Alberto Ostria. La Doctrina del No-Reconocimiento de la Conquista en América. *BN*. 773.
- Hague Convention XIII of 1907:
 Government traffic in contraband. L. H. Woolsey. *Ed*. 498.
 Parties to. 580.
 Prizes in neutral ports. C. C. Hyde. *Ed*. 89.
 Sending out armed vessels. Op. Atty. Gen., *JD*, 728; E. Borchard, *Ed*, 694; H. W. Briggs, *LA*, 574, 576, 580, 587; Q. Wright, *Ed*, 683.
- Hahn, Georg. Grundfragen Europäischer Ordnung. *BR*. 173.
- Hakan, The. [1918] A. C. 148. *Cited*. 226.
- Hall, Marshall. The Wilhelmina case. 74.
- Hall, Wm. E. *Quoted on neutrality*. 400.
- Halperin, S. William. Italy and the Vatican at War. *BR*. 547.
- Hammar skjöld, Åke. Jurisdiction Internationale. *BR*. 371.
- Hanke, Lewis. Handbook of Latin American Studies, 1938. *BN*. 561.
- Harley, J. Eugene. *BN*: Amery, 381; Bullock, 381; Lunau, 181; Moresco, 380; Roberts, 381.
- Harper, Lawrence A. The English Navigation Laws. *BR*. 552.
- Harvard Research in International law. *Cited on agency in state responsibility*, 656; on aggression, 401, 685; on departure of armed ships from neutral ports, 582, 684; on neutrality, 243, 247, 258; on treaties, 438, 439.
 New York Herald-Tribune questionnaire on neutrality legislation. 99.
- Haw Haw, Lord. Broadcasting by. 454.
- Hay, John. Diplomatic correspondence on American rights in Panama Canal. 426.
- Hay-Bunau-Varilla Treaty of 1903. N. J. Padelford. *LA*. 423.
- Hay-Pauncefote Treaty of 1901. N. J. Padelford. *LA*. 417.
- Haynes, George H. The Senate of the United States. *BN*. 374.
- Hays, Kaufmann and Lindheim. The Wilhelmina case. 75, 81, 83, 86.
- Herz, John H. *BR*: Gaither, 769; Mexican Government, 769.
- Higgins, A. P. *Quoted on war*. 394.
- Hill, Norman L. The Background of European Governments. *BN*. 559.
- Hishida, Seiji. Japan Among the Great Powers. *BR*. 545.
- History and international law. *Rereading Grotius*. D. V. Sandifer. *LA*. 459.
- Hitler's Germany. Nazi Background to War, K. Loewenstein, *BR*, 549; Seen by a Foreigner, C. Santoro, *BR*, 549.
- Hodges, Charles. Contemporary World Politics. *BN*. 183.
- Hofheins, Günter. Die Kartellbindung bei internationalen Kartellen. *BN*. 180.
- Holding corporation. Zone von Tanger, der Republik Panama und des britischen Dominiums Canada. H. Rheinstrom. *BN*. 181.
- Holm, Sidney Erick. Broadcasting by. 455.

- Holy Alliance. Note in support of legitimacy, 61; Lady of the, E. J. Knapton, *BN*, 782.
- Horseshoe Reef. Acquisition by executive agreement. 680, 692, 730.
- Huart, F. J. A. Nederlands Aandeel in de Ontwikkeling van het Onzijdighedsrecht gedurende den Wereldoorlog. *BR*. 539.
- Hudson, G. F. The Far East in World Politics. *BN*. 377.
- Hudson, Manley O. Permanent Court of International Justice. 18th Year. *LA*. 1.
- Hughes, Charles E. Statements regarding American rights in Panama Canal. 426.
- Hulen, Bertram D. Inside the Department of State. *BR*. 371.
- Hull, Cordell. Presidential address before A.S.I.L., 492; letter on European possessions in America, 706, regarding interests in China, 201; statement regarding United States Neutrality Act, 240.
- Hungary. Papers Relating to Foreign Relations, *BR*, 368; withdrawal from League of Nations, 15.
- Hurst, Sir Cecil J. B. Great Britain and the Dominions. *Quoted*. 412.
- Huxley, Julian S. Relation of citizen to the state. *Cited*. 38.
- Huyn, Graf. Broadcasting by. 454.
- Hyde, Charles Cheney. *BR*: Freeman, 363; the City of Flint, *Ed*, 89; international law for Finland, *Ed*, 285; quoted on neutrality, 501; on sending out armed vessels from neutral ports, 578, 579, 586, 696.
- Iceland a part of Western Hemisphere, 710; international representation of, 646, 659.
- Immunity of foreign government from suit. *Lamont v. Travelers Ins. Co.* 24 N. E. Rep. (2d), 81. *JD*. 349.
- India:
- Enemy alien problem. R. M. W. Kempner. *LA*. 448.
 - General Act for Pacific Settlement. Reservation as to disputes during war. 18.
 - P.C.I.J. Withdrawal of acceptance of Optional Clause. 16.
 - Indian States and Responsible Government. K. R. R. Sastry. *BN*. 561.
 - Industrial Property Convention of 1883. United States delay in legislation. 678.
 - Innocent passage of belligerent warships. The Altmark case. E. Borchard, *Ed*, 289; British Admiralty opinion, 292.
 - Institute of International Law. Resolution on recognition cited. 47.
 - Institute of Public Affairs, Dallas. America and the World Crisis. *BN*. 184.
 - Insurgent governments:
 - Relations officieuses and intent to recognize. H. W. Briggs. *LA*. 47.
 - State Responsibility for Acts of. H. Silvanie. *BR*. 166.
 - Inter-American Conferences, 1889-1936. *BN*. 177.
 - Inter-American Conventions on Rights and Duties of States. United States intervention in Panama. N. J. Padelford. *LA*. 435.
 - Inter-American Court of Justice. Action of 8th Int. Conf. Am. States. 715.
 - International Community. Law, the State, and. J. B. Scott. *BR*. 365.
 - International Conference of American States, 8th. G. A. Finch. *CN*. 714.
 - International events, Chronicle of. 142, 336, 517, 717.
 - International Institute of Agriculture. Failure of. 677.
 - International Labor Office. Rights of Performers in Broadcasting, etc. *BN*. 555.
- International law:
- Changing concepts of. P. M. Brown. *Ed*. 503.
 - Diritto Internazionale, 1938. *BN*. 178.
 - For Finland. C. C. Hyde. *Ed*. 285.
 - Grotius in 1940. D. V. Sandifer. *LA*. 459.
 - Handbook of. G. G. Wilson. *BR*. 362.
 - Inflation im Völkerrecht der Nachkriegszeit. G. A. Walz. *BN*. 376.
 - Interpretation of. H. J. Morgenthau. *LA*. 281.

- Legal Technique in. H. Kelsen. *BR.* 758.
 Making It Work. Keeton and Schwarzenberger. *BR.* 537.
 John Marshall's. B. M. Ziegler. *BR.* 542.
 Nationalboykott und Völkerrecht. G. A. Walz. *BN.* 179.
 Needs of. C. Eagleton. *Ed.* 699.
 Neutrality and. Q. Wright. *LA.* 399.
 Periodical literature of. 191, 386, 567, 784.
 Pfankuchen, L. Documentary Textbook in. *BR.* 753.
 Positivism, functionalism, and. H. J. Morgenthau. *LA.* 260.
 Social structure and G. Niemeyer. *LA.* 588.
 State responsibility for international propaganda. V. Van Dyke. *LA.* 58.
 Studi di Diritto Internazionale. Ago and Balladore Pallieri. *BN.* 562.
 Support of. P. C. Jessup. *Ed.* 505.
 Time and. G. G. Wilson. *Ed.* 496.
 United States Neutrality Act and Panama resolutions. Q. Wright. *LA.* 238.
 International Law Association. Interpretation of Pact of Paris. 686.
 International Relations. B. W. Maxwell, *BR.* 170; Principles and Problems of, H. A. Steiner, *BR.* 768; University Teaching of, A. Zimmern, *BR.* 544.
 Carr, E. H. The Twenty Years' Crisis, 1919-1939. *BR.* 761.
 Langsam, W. C. The World Since 1914. *BR.* 766.
 Sharp and Kirk, Contemporary International Politics. *BR.* 763.
 Intervention of United States in Panama. N. J. Padelford. *LA.* 435.
 Ionian Islands. International representation of. 641, 648, 650, 653.
 Iraq. International representation of. 659.
 Ireland. *See* Éire.
 Ireland, Gordon. *BR.*: Halperin, 547.
 Istituto di Studi Legislativi. Giurisprudenza Comparata di Diritto Internazionale Privato. *BR.* 169.
 Istituto per Gli Studi di Politica Internazionale. Diritto Internazionale. *BN.* 178.
 Italy. C. Pellizzi. *BN.* 378.
 Enemy alien problem. R. M. W. Kempner. *LA.* 457.
 Fascist. W. Ebenstein. *BN.* 378.
 Vatican and, at War. S. W. Halperin. *BR.* 547.
 War Law of 1938. Visit and search. 315.
- Jackson, Andrew. Note on propaganda against Mexico. 63.
- Japan:
- Among the Great Powers. S. Hishida. *BR.* 545.
 Case Examined. W. W. Willoughby. *BN.* 778.
 Essentials of Constitutional Law. S. Fujii. *BR.* 553.
 Joins the Axis. E. C. Stowell. *Ed.* 711.
- Japan-United States. Diplomatic correspondence concerning China, 1938, 195; American embargo on trade, 203, 205; denunciation of commercial treaty, 203.
- Jefferson, Thomas. Quoted on neutrality. 395.
- Jennings, W. I. A Federation for Western Europe. *BN.* 558.
- Jessup, Philip C. *BR.*: Foreign Relations of Hungary, 368; diversion of merchantmen, *Ed.* 312; in support of international law, *Ed.* 505; Monroe Doctrine in 1940, *Ed.* 704; Neutrality Act of 1939, *Ed.* 95; Neutrality Laws, Regulations and Treaties of Various Countries, *BR.* 753.
- Jobst, Valentine, III. *BR.*: Vitta, 760.
- Johnstone, William C. *BN.*: Jones, 774.
- Jones, F. C. Shanghai and Tientsin, with Reference to Foreign Interests. *BN.* 774.
- Jones, S. Shepard. Documents on American Foreign Relations, 1938-1939. *BR.* 543.

- Jonge Pieter, The. 4 C. Rob. 79. *Cited.* 232.
 Joyce, William. Broadcasting by. 454.
 Judicial notice of historical and political data. Stralla and Adams v. California. 98 Calif. 440. *JD.* 143.
 Jurisdiction. Determination by arbitral commission. Sabotage claims against Germany. *JD.* 154; L. H. Woolsey, *LA.* 28.
 Justiciable and non-justiciable disputes. Lauterpacht quoted. 402.
- Kaltenbach, Frederick W. Self-Determination, 1919. *BN.* 554.
 Kawasaki Kisen Kabushiki v. Bantam S. S. Co. 55 T. L. R. 503. *JD.* 533.
 Kazlauskas, Bronius. L'Entente Baltique. *BR.* 546.
 Keeton, George W. Making International Law Work. *BR.* 537.
 Keller, Hans K. E. L. Der Kampf um die Völkerordnung. *BR.* 173.
 Kelsen, Hans. Legal Technique in International Law. *BR.* 758.
 Kempner, Robert M. W. Enemy alien problem. *LA.* 443.
 Kenya. Enemy alien problem. R. M. W. Kempner. *LA.* 448.
 Kerner, Robert J. Northeastern Asia, Selected Bibliography. *BN.* 185.
 Kim, The. (1915) P. 215. *Cited.* 226.
 King, Virginia Gott. *BN:* Walz, 376.
 Kingsland case. See Sabotage cases, Germany-United States.
 Kirk, Grayson. Contemporary International Politics. *BR.* 763.
 Knapton, Ernest J. The Lady of the Holy Alliance. *BN.* 782.
 Knox, John C. Award in Sudden & Christenson v. United States. *JD.* 737.
 Koepfel, Klaus. Die deutsche Devisengesetzgebung. *BN.* 187.
 Korea. International representation of. 641, 650, 651.
 Krüdener, Julie de. Lady of the Holy Alliance. E. J. Knapton. *BN.* 782.
 Kuhn, Arthur K. Aërial flights over neutral territory, *Ed.* 104; Mexican Supreme Court decision in oil expropriation cases, *Ed.* 297; *BN:* Conferencias Internacionales Americanas, 177.
 Kunz, Josef L. *BR:* Baehr, 173; Baumgarten, 172; Butler, 772; Decleva, 179; Diritto Internazionale, 178; Hahn, 173; Keller, 173; Quadri, 562; Schmitt, 173; Sperduti, 562; Strong, 370; Venturini, 562.
- Ladas, Stephen P. *BN:* Protection des Collections Nationales d'Art et d'Histoire. 562.
 Lagrene mission to China. 479.
 Laing, Lionel H. *BN:* Catlin, 781; Knapton, 782.
 Lamont v. Travelers Ins. Co. 24 N. E. Reporter (2d), 81. *JD.* 349.
 Langsam, Walter C. The World Since 1914. *BR.* 766.
 Lansing, Robert. Attitude on neutral rights compared with that of Wm. H. Seward, 220-237; circular on armed merchantmen cited, 108; correspondence on interference with neutral mails, 316; on neutrality and impartiality, 241; on removal of enemy persons from neutral vessels, 252, 254; Papers, 1914-1920, *BR.* 756.
 Larkin, John D. Trade Agreements: A Study in Democratic Methods. *BN.* 780.
 Lasswell, Harold D. *BN:* Richardson, 383.
 Latin American Independence, France and. W. S. Robertson. *BN.* 378.
 Latin American Studies Handbook. Hanke and D'Eca. *BN.* 561.
 Laurie, A. P. The Case for Germany. *BN.* 382.
 Lauterpacht, H. Quoted on neutrality. 391, 400.
 Laves, Walter H. C. International Security. *BN.* 380.
- Law:
 Development of, and international law. 408.
 Grundsätze der juristischen Methodenlehre. A. Baumgarten. *BR.* 172.
 The State and the International Community. J. B. Scott. *BR.* 365.

- League of American Nations. Inter-American conferences and. G. A. Finch. *CN.* 716.
- League of Nations. Admission of small states, proposed, 648; expulsion of Union of Soviet Socialist Republics, 285; meetings scheduled for 1939, 18; Jan C. Smuts memo., 414.
- League of Nations Covenant. Yepes and da Silva, *Commentaire Théorique et Pratique de*, *BR.* 759; Textual Critique, H. Kelsen, *BR.* 758.
- Leased territories. G. G. Wilson. *Ed.* 703.
- Legislation for enforcement of treaties in United States. H. Reiff. *LA.* 665.
- LeRoy, Howard S. *BN:* Hofheins, 180; Rheinstrom, 181; Rights of Performers, 555.
- Leucade, The. 2 Spinks 212. *Cited.* 653.
- Levinson v. United States. 258 U. S. 198. *Cited.* 680, 692, 731.
- Lewis, Edward G. *BN:* Michael, 781.
- Liability of foreign sovereigns, laws protecting. 69.
- Licenses, belligerent, to trade, in World War and American Civil War precedents. A. M. McDiarmid. *LA.* 227.
- Liechtenstein. Acceptance of optional clause of P.C.I.J., 13; international representation of, 639, 642, 643, 647, 649, 652, 654.
- Liechtenstein-Hungary. The Gerlicsy case. - P.C.I.J. M. O. Hudson. *LA.* 12.
- Linebarger, Paul M. A. Government in Republican China. *BN.* 184.
- Lissitzyn, Oliver J. *BN:* Ago, 379; Sandiford, 555.
- Lloyd, Lord, of Dolobran. The British Case. *BN.* 382.
- Local remedies, exhaustion of. R. Ago, *BN.* 379; Panevėžys-Saldutiskis Ry. case, P.C.I.J., 1.
- Lockey, Joseph B. Essays in Pan Americanism, *BN.* 560; *BN:* Handbook of Latin American Studies, 561.
- Loewenstein, Karl. Hitler's Germany: The Nazi Background to War. *BR.* 549.
- London Declaration of 1909. In the World War. A. M. McDiarmid. *LA.* 221.
- Lorenzen, E. G. *BR:* Glusprudenza Comparata di Diritto Internazionale, 169; Koeppele, 187; Raape, 186.
- Lorimer, James. Quoted on neutrality. 400.
- Lothian, Lord. Letter presenting Magna Charta to Cordell Hull, 492; quoted on Pax Britannica, 413.
- Lunau, Heinz. Illusions et Réalités dans la Politique Internationale de Paix. *BN.* 181.
- Luria v. United States. 231 U. S. 9. *Cited.* 45.
- Luther, Martin. Definition of war. 393.
- Luther v. Sagor. [1921] 3 K.B. 532. *Cited.* 55.
- Luxemburg:
- International representation of. 642, 643, 644, 647, 654, 659.
 - Invasion by Germany in 1940. Declaration of American Republics, 687; statement by President Roosevelt, 688.
- Machiavelli, The Prince. Quoted on neutrality. 395
- MacKenzie, Norman. *BN:* Grotius Society, 777; Medlicott, 376.
- Mackenzie v. Hare. 239 U. S. 299. *Cited.* 44.
- Madagascar. International representation of. 641, 650, 660.
- Magna Charta presented to Cordell Hull. 492.
- Mails, interference with, by belligerents. Correspondence between Great Britain and United States. American Civil War, 233; European War of 1939, 244, 315; World War, 233, 315.
- Mallory, Walter H. *BN:* Hill and Stoke, 559.
- Manchester v. Massachusetts. 139 U. S. 264. *Cited.* 151.
- Mandated territory. Agency in international law. A. P. Sereni. *LA.* 638.
- Manning, William R. *BN:* Robertson, 378; Diplomatic Correspondence of United States, Inter-American Affairs, *BN.* 178.
- Marriott, John A. R. Commonwealth or Anarchy? *BN.* 780.

- Marshall, James. *Swords and Symbols: The Technique of Sovereignty*. *BN*. 182.
- Marshall, John. *International Law of*. B. M. Ziegler. *BR*. 542.
- Martin, Charles E. *BR*: Ford, 548; regionalism and neutrality in the Americas, *Ad*, 493.
- Martin, Lawrence. Quoted on Western Hemisphere. 710.
- Massachusetts. Territorial waters of. 151.
- Mavrommatis case before P.C.I.J. *Cited*. 656, 658.
- Maxwell, Bertram W. *International Relations*. *BR*. 170.
- Mazzini. Quoted on neutrality. 400.
- McCain, W. D. *United States and Republic of Panama*. *Cited*. 416, 429.
- McConaughy v. Morrow. III Canal Zone Rep. 377. *Cited*. 610.
- McDiarmid, Alice Morrissey. *American Civil War precedents*. *LA*. 220.
- Meade, J. E. *The Economic Basis of a Durable Peace*. *BN*. 776.
- Medlicott, W. N. *The Congress of Berlin and After*. *BN*. 376.
- Merchantmen, neutral, diversion of. C. Eagleton, *Ed*, 315; P. C. Jessup, *Ed*, 312.
- Metric system. *United States law*. 674.
- Mexico:
- Expropriation in. *The Facts and the Law*, R. B. Gaither, *BR*, 769; *True Facts about*, *BR*, 769; *Supreme Court decision*, A. K. Kuhn, *Ed*, 297.
 - Committee of Bankers v. Travelers Ins. Co.* 24 N. E. Rep. (2d), 81. *JD*. 349.
- Mexico-United States:
- American relations with unrecognized government, 1913*. 54.
 - Publication of diplomatic correspondence*. R. R. Wilson. *Ed*. 509.
- Michael, Wolfgang. *The Quadruple Alliance. England under George I*. *BN*. 781.
- Military measures in Panama Canal Zone and Panama. N. J. Padelford. *LA*. 635.
- Miller, Atty. Gen. *Opinion on Industrial Property Convention*. *Cited*. 671, 672.
- Miller, Hunter. *Reservations to treaties*. *Cited*. 93.
- Minor v. Happersett. 21 Wallace 162. *Cited*. 38.
- Mistake. *Reopening of arbitral award. Sabotage cases*. *JD*, 154; L. H. Woolsey, *LA*, 23.
- Mixed Courts in Egypt. *Transition period*. J. Y. Brinton. *LA*. 213.
- Mobilizing Civilian America. H. J. Tobin and P. W. Bidwell. *BN*. 782.
- Monaco. *International representation of*. 642.
- Monroe Doctrine:
- Economic Aspects of*. T. H. Reynolds. *BN*. 183.
 - In 1940*. P. C. Jessup. *Ed*. 704.
- Montreux Conference on capitulations in Egypt. J. Y. Brinton. *LA*. 208.
- Moore, John Bassett. *Cited on recognition, 47; on war and neutrality, 397, 501*.
- Mores and international law. H. J. Morgenthau. *LA*. 260.
- Moresco, Emanuel. *Colonial Questions and Peace*. *BN*. 380.
- Morgenthau, Hans J. *Positivism, functionalism, and international law*, *LA* 260; *BR*: Keeton and Schwarzenberger, 537; Wambaugh, 541.
- Mormacsun, S. S. *Diversion of*. P. C. Jessup. *Ed*. 312.
- Morocco. *International representation of*. 640, 642, 646, 647, 650, 656.
- Mowat, R. B. *The American Entente*. *BN*. 558.
- Munich to Danzig. R. W. Seton-Watson. *BN*. 382.
- Municipal law and international law:
- Enforcement of neutrality*. Q. Wright. *LA*. 240.
 - Rereading Grotius in 1940*. D. V. Sandifer. *LA*. 466.
- Munro, Dana G. *BN*: Guatemala White Book, Belize Question, 177.
- Munster, Ralf F. W. *BN*: Walz, 179.
- Museums, *International Office of*. *La Protection des Collections Nationales d'Art et d'Histoire*. *BN*. 562.
- Myers, Denys P. *BN*: Stuyt, 554; *Documents on American Foreign Relations*, *BR*, 543.

Myres, S. D., Jr. America and the World Crisis, *BN*, 184; *BR*: Shotwell, 540, Warbasse, 182.

Nailsea Meadow, S. S. 55 T. L. R. 503. *JD*. 533.

Najera, Pablo. Case of. Fr.-Mex. Mix. CL Com. *Cited*. 653.

Narcotic Drugs Convention of 1931. Japanese failure to enforce. 676.

Narcotics. Traffic in Panama Canal Zone. 619.

Nassau. Embargo on trade with, in American Civil War. 229.

Nationality:

The Cardenas doctrine. P. M. Brown. *Ed*. 300.

Laws of United States, revision of. R. W. Flournoy. *LA*. 36.

Nationalization and control of munitions trade. A. Bigant. *BN*. 774.

Nationals. Extradition of. R. W. Rafuse. *BR*. 368.

Natural law and development of international law. G. Niemeyer, *LA*, 588; Grotius on, D. V. Sandifer, *LA*, 459.

Naturalization of enemy aliens. R. M. W. Kempner. *LA*. 447, 452, 453.

Naturalization. Revision of United States laws. R. W. Flournoy. *LA*. 40.

Naval bases for United States:

Acquisition by executive agreement. Op. Atty. Gen., *JD*, 728; E. Borchard, *Ed*, 690; Q. Wright, *Ed*, 680.

Messages of Presidents Johnson and Hayes, 703; message of F. D. Roosevelt, 569.

Navemar, The. 303 U. S. 68. *Cited*. 354.

Navicerts, British, distinguished from American licenses. 227.

Nebolsine, George. *BN*: Shotwell and Deák, 777.

Nereide, The. 9 Cranch 388. *Cited*. 110.

Netherlands:

Belligerent air flights over. 106.

General Act for Pacific Settlement. Reservation of denunciation. 18.

Invasion by Germany in 1940. Declaration of American Republics, 687; statement by President Roosevelt, 688.

Nederlands Aandeel in de Ontwikkeling van het Onzijdigheidsrecht gedurende den Wereldoorlog. F. J. A. Huart. *BR*. 539.

Neutrality of. B. M. Telders. *BN*. 779.

P.C.I.J. Reservations on withdrawals of acceptances of Optional Clause. 15, 17.

Neutral ports and waters. Prisoners of war in. The Altmärk case, E. Borchard, *Ed*, 289; British Admiralty opinion, 292.

Neutral vessels. Removal of enemy persons from, H. W. Briggs, *LA*, 249; R. M. W. Kempner, *LA*, 453; in World War and American Civil War, 233.

Neutrality:

American Republics' declaration, 1939. P. M. Brown, *Ed*, 112; C. G. Fenwick, *Ed*, 116; Q. Wright, *LA*, 245.

Change of legislation during war. C. Eagleton, *Ed*, 99; C. G. Fenwick, *Ed*, 116.

Éire. R. R. Wilson. *Ed*. 125.

Government traffic in contraband. L. H. Woolsey. *Ed*. 498.

Impartiality in. C. Eagleton, *Ed*, 99; Q. Wright, *LA*, 238.

Keeping out of war, and. G. G. Wilson. *Ed*. 89.

Laws, Regulations and Treaties of Various Countries. Collection of. F. Deák and P. C. Jessup. *BR*. 753.

Nederlands Aandeel in de Ontwikkeling van het Onzijdigheidsrecht gedurende den Wereldoorlog. F. J. A. Huart. *BR*. 539.

On the defensive. C. G. Fenwick. *Ed*. 697.

Present status of. Q. Wright. *LA*. 391.

Scandinavia: The Background for. A. L. Olson. *BR*. 537.

- United States:-
 Act of 1939. P. C. Jessup, *Ed*, 95; Q. Wright, *LA*, 238, 246.
 Exchange of naval and air bases for destroyers. Op. Atty. Gen., *JD*, 728; E. Borchard, *Ed*, 690; H. W. Briggs, *LA*, 569; Q. Wright, *Ed*, 680.
 Power to declare under American law. Q. Wright. *Ed*. 302.
 Regulations governing aircraft in Panama Canal Zone. 633.
 Trial and Failure. C. G. Fenwick. *BR*. 755.
 Neutralization of Panama and Suez Canals. N. J. Padelford. *LA*. 418, 431.
 Newiang, Oscar. World Federation. *BN*. 181.
 New Zealand. Reservation to General Act for Pacific Settlement as to disputes during war, 18; withdrawal of acceptance of Optional Clause of P.C.I.J., 16.
 Nicaragua. Adherence to P.C.I.J. 13.
 Nicholson, Harold. Diplomacy. *BN*. 177.
 Niemeyer, Gerhart. International law and social structure. *LA*. 588.
 Niemeyer, Theodor. In memoriam. 334.
 Nieuw Amsterdam, Dutch steamer. Removal of enemy persons from. 453.
 Nine Power Treaty of 1922. Far Eastern policies of United States. W. W. Willoughby. *LA*. 193.
 Ning Yi-Ching, In re. British Vacation Court. *JD*. 347.
 Noble, G. Bernard. *BR*: Benes, 373.
 Non-belligerency status. E. Borchard, *Ed*, 697; H. W. Briggs, *LA*, 569; Q. Wright, *Ed*, 685.
 Non-recognition of Japan's actions in China. United States attitude. W. W. Willoughby. *LA*. 198.
 Norway:
 Action in Altmark case. E. Borchard. *Ed*. 289.
 Attitude on prizes in neutral ports. The City of Flint. C. C. Hyde. *Ed*. 89.
 Statement by President Roosevelt regarding German invasion in 1940. 688.
 Nyassa, Portuguese steamer. Removal of enemy persons from. 453.
 Obrecht, André. Broadcasting by. 454.
 Obscene Publications, Convention for Repression of. Non-enforcement. 677.
 Occupied territory. Foreign diplomatic and consular representation in. E. C. Stowell. *Ed*. 310.
 Ocean, The. 3 C. Rob. 297. *Cited*. 232.
 Ogdon, Montell. *BN*: Fen, 775; Meade, 776.
 Ogg, Frederic A. European Governments and Politics. *BN*. 559.
 Oil properties in Mexico. Expropriation of. R. B. Gaither, *BR*, 769; Government of Mexico, *BR*, 769; cases in Mexican Supreme Court, A. K. Kuhn, *Ed*, 297.
 Olinde Rodrigues. 174 U. S. 510. *Cited*. 746.
 Olson, Alma Luise. Scandinavia: Background for Neutrality. *BR*. 537.
 Open door in China. United States attitude in China-Japan hostilities, 1938. W. W. Willoughby. *LA*. 197.
 Opium Convention of 1912. Non-performance of obligations. 676.
 Oppenheim, L. Quoted on armed vessels as contraband of war, 584, 587, 682, 695, 735.
 Pacific Fisheries, with Reference to Alaska Salmon. Gregory and Barnes. *BN*. 778.
 Padelford, Norman J. American Rights in Panama Canal, *LA*, 416; Panama Canal in time of peace, *LA*, 601; *BN*: Geahkoff, 780.
 Palestine mandate:
 Enemy alien problem. R. M. W. Kempner. *LA*. 448.
 Native of, not a British subject. *Rex v. Ketter*. 55 T. L. R. 449. *JD*. 529.
 Pan American Convention on statistical nomenclature, 1923. *Cited*. 674.
 Pan American trademark and copyright conventions, non-enforcement of. 675, 678.

Pan American Union. Yepes and da Silva, *Commentaire Théorique et Pratique de la Société des Nations et des Statuts de*. *BR.* 759.

Pan Americanism. Essays in. J. B. Lockey. *BN.* 560.

Pan Americanism and a league of American nations. G. A. Finch. *CN.* 718.

Panama:

Constitution. American rights in Panama Canal. N. J. Padelford. *LA.* 434.

Legislative approval of treaty with United States of 1936, with minutes and notes exchanged. 636.

Panama Canal:

American rights in. N. J. Padelford, *LA.* 416; in time of peace, N. J. Padelford, *LA.* 601.

Rules and regulations in peace, 611; use during war, 612; control of persons in, 623; explosives and firearms in, 622; fortification of, 635.

Panama Canal Zone. United States admiralty jurisdiction, 608; extradition in, 609; sanitation of, 617; narcotics traffic, 619; alcoholic liquor traffic, 620; aliens in, 625; radio communications in, 627; aircraft in, 631.

Panama declaration of security zone. P. M. Brown, *Ed.* 112; C. G. Fenwick, *Ed.* 116; Q. Wright, *LA.* 238.

Panama-United States:

American rights in Panama Canal, N. J. Padelford, *LA.* 416; in time of peace, N. J. Padelford, *LA.* 601.

Difference over Canal annuities, 428, 601; over United States commercial transactions and customs service, 602, 607, 616; radio communications, 627, convention of 1936, 630; minutes and notes exchanged with general treaty of 1936, 636.

Treaty of 1903 for construction of Canal. N. J. Padelford. *LA.* 423.

Treaty of 1936. N. J. Padelford, *LA.* 440, 607, 631; agreement regarding military measures for defense of Canal, 635.

Panevezys-Saldutiskis Ry. case. P.C.I.J. M. O. Hudson, *LA.* 1; *cited* 639.

Paquete Habana. 175 U. S. 677. *Cited.* 747.

Paraguay. Withdrawal from optional clause of P.C.I.J. 15.

Paris Pact for Renunciation of War:

Far Eastern policy of United States. W. W. Willoughby. *LA.* 196.

Rights and duties of parties in case of aggression. Q. Wright. *Ed.* 686.

Parker of Waddington, Lord. Quoted on development of law. 408.

Parker v. Mexico. Gen. Cl. Com. U. S.-Mex. *Cited.* 24, 25.

Pax Britannica, neutrality and. Q. Wright. *LA.* 410.

Peace, international:

Colonial Questions and. E. Moresco. *BN.* 380.

Coöperation as a Way of. J. P. Warbasse. *BN.* 182.

Economic Basis of. J. E. Meade. *BN.* 776.

Illusions et Réalités. H. Lunau. *BN.* 181.

Population and. F. C. Wright. *BN.* 375.

Problems of Peace and War. Grotius Society. *BN.* 185, 777.

Projects. Marriott, J. A. R. Survey from 16th to 20th Century. *BN.* 780.

Quest for Since the World War. W. E. Rappard. *BR.* 550.

Peaceful Change and the Colonial Problem. B. Wood. *BR.* 762.

Pelenyi, John. Reception to A.S.I.L. 496.

Pellizzi, Camillo. Italy. *BN.* 378.

Pereira da Silva. *Commentaire Théorique et Pratique du Pacte de la Société des Nations et des Statuts de l'Union Panaméricaine.* *BR.* 759.

Periodical literature of international law. 191, 386, 567, 784.

Permanent Court of International Justice. A. Hammarskjöld, *BR.* 371; 18th year, M. O. Hudson, *LA.* 1.

- Election of judges scheduled for 1939, 18; reduction of salaries, 20; instruments relating to, 13; finances, 21.
- Optional Clause. Jurisdiction *ratione temporis*. Electricity Co. of Sofia case. 5.
- Withdrawals of acceptance during war. 16.
- Peru-United States. American relations with insurgent government, 1885, 53; publication of diplomatic correspondence, 509.
- Peterhoff, The. 5 Wallace 49. *Cited*. 222, 225, 232, 235.
- Pfankuchen, Llewellyn. Documentary Textbook in International Law. *BR*. 753.
- Pharmacopoeial formulas agreement of 1906. United States attitude. 675.
- Philadelphia-Girard Natl. Bank case. U. S.-Ger. Cl. com. *Cited*. 24, 27, 31.
- Piepenbrink case. *Cited*. 233.
- Pipkin, Charles W. *BN*: Marriott, 780; Myres, 184.
- Podesta Costa, L. A. *Cited* on recognition *de facto*. 57.
- Poland, occupied. Foreign diplomatic and consular representation in. 310.
- Political agreements, international law and. H. J. Morgenthau. *LA*. 279.
- Politics, Contemporary International. W. R. Sharp and G. Kirk. *BR*. 763.
- Population and Peace. F. C. Wright. *BN*. 375.
- Portugal. Patronage of Catholic missions. H. M. Cole. *LA*. 473.
- Positivism, functionalism, and international law. H. J. Morgenthau. *LA*. 260.
- Postal agreements. United States Act of 1934 concerning. *Cited*. 671.
- Prussia, Lawrence. *BN*: Ebenstein, 378.
- Prisoners of war:
- In neutral territorial waters. The Altmark case. E. Borchard, *Ed*, 289; British Admiralty opinion, 292.
 - Rules relating to. R. R. Wilson. *Ed*. 320.
- Private international law:
- Deutsche Devisengesetzgebung im internationalen Privatrecht. K. Koepfel. *BN*. 187.
 - Deutsches Internationales Privatrecht. L. Raape. *BN*. 186.
 - Giurisprudenza Comparata di Diritto Internazionale Privato. *BR*. 169.
 - Tratado de Derecho Internacional Privado. A. Cock A. *BN*. 554.
- Prize law. American Civil War precedents. A. M. McDiarmid. *LA*. 220.
- Prizes in neutral ports. The City of Flint. C. C. Hyde. *Ed*. 89.
- Propaganda, international. State responsibility for. V. Van Dyke. *LA*. 58.
- In United States during World War. The Wilhelmina. J. C. Crighton. *LA*. 86.
- Protectorates. G. Venturini, *BN*, 562; agency in international law, A. P. Sereni, *LA*, 638.
- Public opinion. Common consent necessary. 403.
- Quadri, Rolando. Le Navi Private nel Diritto Internazionale. *BN*. 562.
- Quigley, Harold S. *BR*: Hishida, 545; Hudson, 377; Willoughby, 778; Zimmern, 544.
- Raape, Leo. Deutsches Internationales Privatrecht. *BN*. 186.
- Radio broadcasting by enemy aliens. R. M. W. Kempner. *LA*. 454.
- Radio communications in Panama Canal Zone. N. J. Padelford. *LA*. 627.
- Radio propaganda, international. V. Van Dyke. *LA*. 63.
- Rafuse, Robert W. The Extradition of Nationals. *BR*. 368.
- Ralston, Jackson H. Quoted on war, 410; *BN*: Cock, 554.
- Randolph, Bessie C. *BR*: E. H. Carr, 761.
- Rappard, William E. The Quest for Peace Since the World War: *BR*. 550.
- Recognition:
- Power of Congress in. Q. Wright. *Ed*. 304.
 - Relations officieuses and intent to recognize. H. W. Briggs. *LA*. 47.
- Reeves, Jesse S. *BR*: Manning, 178; Scott, 365; Whittlesey, 366.
- Refugees, political. Enemy alien problem. R. M. W. Kempner. *LA*. 443.

- Reiff, Henry. Enforcement of administrative treaties in United States. *LA.* 661.
- Relations officieuses and intent to recognize. H. W. Briggs. *LA.* 47.
- Renn, Ludwig. Warfare: The Relation of War to Society. *BR.* 367.
- Representation, international, by third states. A. P. Sereni. *LA.* 638.
- Reprisal. Measures in World War compared with American Civil War. 231.
- Requisition of neutral vessels. *Sudden & Christenson v. United States.* *JD.* 737.
- Rex v. Ketter. 55 T. L. R. 449. *JD.* 529.
- Reynolds, Thomas H. Economic Aspects of the Monroe Doctrine. *BN.* 183.
- Rheinstrom, Heinrich. Die Holding-Gesellschaft nach den Rechten der internationalen Zone von Tanger, der Republik Panama und des britischen Dominiums Canada. *BN.* 181.
- Richardson, Lewis F. Generalized Foreign Politics. *BN.* 383.
- Robbins, Lionel. The Economic Causes of War. *BN.* 775.
- Roberts, Granville. The Nazi Claims to Colonies. *BN.* 381.
- Robertson, William Spence. France and Latin American Independence. *BN.* 378.
- Rodgers, W. L. *BN:* Eliot, 375; Renn, 367.
- Roman law and development of international law. G. Niemeyer. *LA.* 588.
- Roosevelt, Franklin D.:
 Action on proposed sale of torpedo boats to Great Britain. 571.
 Message on exchange of destroyers for naval bases. Sept. 3, 1940. 569.
 Reply to Premier Reynaud of France, June 15, 1940. 500, 688.
 Speech at Chicago, Oct. 5, 1937. 201, 206.
 Statements regarding invasion of neutral countries by Germany in 1940. 688.
- Roosevelt, Theodore. Annual message on acquisition of Panama Canal. 423.
- Root, Elihu. Letter regarding American rights in Panama Canal. 435.
- Roucek, Joseph S. Contemporary World Politics. *BN.* 183.
- Rousseau v. Brown. 21 App. Cas. (D. C.) 73. *Cited.* 671, 672.
- Rupp, Hans. Staatsvertreter vor internationalen Schiedsgerichten. *BR.* 757.
- Russia. International propaganda of government of. 64, 67.
- Ryan, James W. Cited on exchange of destroyers for naval bases. 690, 694.
- Saar Plebiscite. S. Wambaugh. *BR.* 541.
- Sabotage cases, Germany-United States. *JD.* 154; L. H. Woolsey, *LA.* 23.
- Saerchinger, César. The Way Out of War. *BN.* 557.
- Salter, Sir Arthur. Security—Can We Retrieve It? *BN.* 380.
- San Juan Island. Executive agreement for occupation of. 681.
- San Marino. International representation of. 644.
- Sanctions. 8th Int. Conf. Am. States, action. 715.
- Sandifer, Durward V. Evidence before International Tribunals, *BR.* 165; rereading Grotius in 1940, *LA.* 459.
- Sandiford, Roberto. Diritto Marittimo di Guerra. *BN.* 555.
- Sanitary Conventions. Dispute as to Honolulu, 674; non-performance, 676.
- Santa Monica Bay. Territorial jurisdiction in. *Stralla and Adams v. California.* 98 Calif. 440. *JD.* 143.
- Santissima Trinidad, The. 7 Wheaton 283. *Cited.* 579, 683, 695.
- Santoro, Cesare. Hitler Germany as Seen by a Foreigner. *BR.* 549.
- Sastry, K. R. R. Indian States and Responsible Government. *BN.* 561.
- Saturnia, Italian steamer. Removal of enemy persons from. 453, 454.
- Sayre, Francis B. The Protection of American Export Trade. *BN.* 560.
- Scandinavia: Background for Neutrality. A. L. Olson. *BR.* 537.
- Scott, James Brown. Law, the State, and the International Community. *BR.* 365.
- Schmitt, Carl. Völkerrechtliche Grossraumordnung. *BR.* 173.
- Schreiber, Joachim-Hans. Die deutschen Kolonien. *BN.* 378.

- Schuman, Frederick L. *BR*: Chambers, 171; Langsam, 766; Maxwell, 170.
- Schwarzenberger, Georg. Making International Law Work. *BR*. 537.
- Security, international. W. H. C. Laves, *BN*, 380; A. Salter, *BN*, 380.
- Zone around the Americas. Declaration of Panama. P. M. Brown, *Ed*, 112; C. G. Fenwick, *Ed*, 116; Q. Wright, *LA*, 246.
- Self-defense in case of aggression on third state. C. G. Fenwick. *Ed*. 698.
- Self-Determination, 1919. Germany and Poland. F. W. Kaltenbach. *BN*. 554.
- Senate of the United States. Its History and Practice. G. H. Haynes. *BN*. 374.
- Serbia. Propaganda against Austria-Hungary. 62, 64, 66.
- Sereni, Angelo Piero. Agency in international law. *LA*. 638.
- Seton-Watson, R. W. From Munich to Danzig. *BN*. 382.
- Seward, William H. Attitude on neutral rights. 220-237.
- Shanghai and Tientsin, with Reference to Foreign Interests. F. C. Jones. *BN*. 774.
- Sharp, Walter R. Contemporary International Politics. *BR*. 763.
- Ships, private. Le Navi Private nel Diritto Internazionale. R. Quadri. *BN*. 562.
- Shotwell, James T. Turkey at the Straits, *BN*, 777; What Germany Forgot, *BR*, 540.
- Silvanie, Haig. Responsibility of States for Acts of Unsuccessful Insurgent Governments. *BR*. 166.
- Slovakia. International representation of. 648.
- Smith, D. H. The Panama Canal. *Cited*. 416.
- Smith, H. A. Cited on non-recognition. 56.
- Smuts, Jan C. Memo. on League of Nations quoted. 414.
- Société Commerciale de Belgique case. P.C.I.J. M. O. Hudson. *LA*. 10.
- Sociology and international law. Hans J. Morgenthau. *LA*. 260.
- Sommelsdijk, The. British Court of Appeal. *Cited*. 312.
- South American revolutionary governments. American and British practice in relations with. 52.
- Sovereign. Immunity from suit in foreign court. *Lamont v. Travelers Ins. Co.* 24 N. E. Rep. (2d), 81. *JD*. 349.
- Sovereignty. Airspace, A. K. Kuhn, *Ed*, 104; leased territories, G. G. Wilson, *Ed*, 703; Technique of, J. Marshall, *BN*, 182.
- Spain. British recognition of Franco insurgent government, 47; denunciation of General Act for Pacific Settlement, 18.
- Spencer, John H. *BN*: Berkol, 779.
- Sperduti, Giuseppe. Aspetti Giuridici del Sangiaccato di Alessandretta. *BN*. 562.
- Springbok, The. 5 Wallace 20. *Cited*. 224, 232.
- Stark, H. R., Admiral. Certificate on exchange of destroyers for naval and air bases. 574, 693, 733.
- State:
- Church and, in development of international law. G. Niemeyer. *LA*. 588.
- The Earth and the. D. Whittlesey. *BR*. 366.
- Law, and the International Community. J. B. Scott. *BR*. 365.
- Totalitarian. Symposium on. American Philosophical Society. *BN*. 557.
- State Department, United States:
- Inside the. B. D. Hulen. *BR*. 371.
- Order on publication of diplomatic correspondence. 510.
- State responsibility:
- Acts of Insurgent Governments. H. Silvanie. *BR*. 166.
- Agency in international law. A. P. Sereni. *LA*. 655.
- S. Arató, Die Völkerrechtliche Haftung. *BN*. 773.
- Denial of Justice. A. V. Freeman. *BR*. 363.
- International propaganda. V. Van Dyke. *LA*. 58.
- La Regola del Previo Esaurimento dei Ricorsi Interni. R. Ago. *BN*. 379.

- Steiner, H. Arthur. Principles and Problems of International Relations, *BR*, 768; *BN*: Pellizzi, 378.
- Steinhardt, Laurence A. Report on City of Flint. 91.
- Stephens, Waldo E. Revisions of the Treaty of Versailles. *BR*. 166.
- Stert, The. 4 C. Rob. 65. *Cited*. 232.
- Stetson v. United States. Alabama Cl. Com. No. 3993. *Cited*. 151.
- Stimson, Henry L. Letter regarding China-Japan hostilities, 196; non-recognition note of Jan. 7, 1932, 198.
- Stoke, Harold W. The Background of European Governments. *BN*. 559.
- Stowell, Ellery C. The Cromwell incident, *Ed*, 294; foreign diplomatic and consular representation in Poland, *Ed*, 310; Japan joins the Axis, *Ed*, 711; United States coöperation in conservation of whales, *Ed*, 324; *BN*: D'Ormesson, 377, Nicholson, 177.
- Straits:
- Berkol, F. Le Statut Juridique Actuel des Portes Maritimes. *BN*. 779.
- Shotwell and Deak, Turkey at the. *BN*. 777.
- Stralla and Adams v. California. 98 Calif. 440. *JD*. 143.
- Strong, David F. Austria: Transition from Empire to Republic. *BR*. 370.
- Stuart, Graham. *BR*: Dawes, 767; Hulen, 371; Schreiber, 378.
- Studer case. Am. Br. Cl. Arb. Trib. *Cited*. 658.
- Sturzo, Luigi. Quoted on war. 393, 395.
- Stuyt, A. M. Survey of International Arbitrations, 1794-1938. *BN*. 554.
- Suarez and Grotius in the development of international law. G. Niemeyer. *LA*. 588.
- Submarine Cables Convention of 1884. United States failure to enforce. 677, 678.
- Submarine warfare, German, in 1914. Relation of British blockade to. 79.
- Subpoenas. Issuance by U. S.-Ger. Cl. Com. 27.
- Sudden & Christenson v. United States. *JD*, 737; Act for payment, 751.
- Suez Canal:
- Alliance of Egypt-Great Britain. J. Y. Brinton. *LA*. 208.
- Berkol, F. Le Statut Juridique Actuel des Portes Maritimes. *BN*. 779.
- Convention compared with Panama Canal convention. 418.
- Switzerland:
- Belligerent air flights over. 106.
- General Act for Pacific Settlement. Reservation of denunciation of. 18.
- International propaganda. Responsibility for. 65, 66, 67, 71.
- Reservation of denunciation of Optional Clause of P.C.I.J. 17.
- Taft, William H. Statement regarding American rights in Panama Canal, 427, 435; agreement with Panama, 602.
- Tanganyika Territory. Enemy alien problem. R. M. W. Kempner. *LA*. 448.
- Telders, B. M. Nederlands Onzijdigheid. *BN*. 779.
- Temple, Henry W. *BN*: Tobin and Bidwell, 782.
- Territorial waters:
- Belligerent vessels in. The Altmark case. E. Borchard, *Ed*, 289; British Admiralty opinion, 292.
- Declaration of Panama of 1939. P. M. Brown, *Ed*, 112; C. G. Fenwick, *Ed*, 116; Q. Wright, *LA*, 238.
- Santa Monica Bay. Stralla and Adams v. California. 98 Calif. 440. *JD*. 143.
- Tientsin, China. British jurisdiction over foreigners. In re Ning Yi-Ching. *JD*. 347.
- Tientsin. Shanghai and, with Reference to Foreign Interests. F. C. Jones. *BN*. 774.
- Time and international law. G. G. Wilson. *Ed*. 496.
- Tobin, Harold J. Mobilizing Civilian America, *BN*, 782; *BN*: Bigant, 774.
- Torpedo boats. Proposed sale by United States to Great Britain, 1940, 569, 734; sale by Germany to Russia during war with Japan, 583, 736.

- Trade Agreements: A Study in Democratic Methods. J. D. Larkin. *BN*. 780.
- Trade-mark conventions, Pan American. Non-enforcement of. 675, 678.
- Transvaal. International representation of. 648.
- Treaties:
- Made in violation of international law. C. C. Hyde. *Ed*. 285.
 - Multipartite. Enforcement in United States. H. Reiff. *LA*. 661.
 - State responsibility for international propaganda. 58.
 - E. Vitta, *La Validité des Traités Internationaux*. *BR*. 760.
- Treaty-making power:
- Constitutional limitations and the. American rights in Panama Canal. N. J. Padelford. *LA*. 437.
 - United States. Participation of House of Representatives. H. Reiff. *LA*. 678.
- Trent, The. Principle applied in American Civil War and World War, 233; *cited* 244, 258.
- Tunis. International representation of. 640, 646, 650, 658.
- Turkey at the Straits. J. T. Shotwell and F. Deák. *BN*. 777.
- Twenty Years' Crisis, 1919-1939. E. H. Carr. *BR*. 761.
- Ujvary, Dezso. Foreign Relations of Hungary. *BR*. 368.
- Umpire. Participation in work of national commissioners. U. S.-Ger. Mix. Cl. Com. *JD*, 154; L. H. Woolsey, *LA*, 25.
- Union of South Africa. Withdrawal of acceptance of Optional Clause of P.C.I.J. 16.
- Union of Soviet Socialist Republics:
- Aggression against Finland, 285; expulsion from League of Nations, 285.
 - Treaties and practice on international propaganda. V. Van Dyke. *LA*. 60, 62, 64, 67, 68, 71.
- Union of Soviet Socialist Republics-United States. City of Flint. C. C. Hyde. *Ed*. 89.
- United States:
- Act of March 3, 1883. Disposal of naval vessels. *Cited*: 680, 692, 731.
 - Act of June 15, 1917. Enforcement of neutrality, 499, 575, 681, 734; Congressional consideration, 578, 693, 735.
 - Act of June 28, 1940. Disposal of military and naval supplies, 499, 680, 692; Senate consideration, 571, 732.
 - Act of July 2, 1940. Disposal of army equipment, 573, 732.
 - See* Panama Canal, *below*.
 - Armed merchantmen in American ports. 108.
 - Arms sold to France during Franco-Prussian War. 502.
 - Attorney General. Opinion on exchange of naval and air bases for destroyers. *JD*, 728; E. Borchard, *Ed*, 690; H. W. Briggs, *LA*, 569; Q. Wright, *Ed*, 680.
 - Congress, First. Discussion of naturalization. 39.
 - Congressional resolution on European possessions in America, 1940, 706; Congressional resolution of 1811, 707.
 - Diplomatic Correspondence, Spain, 1831-1860. W. R. Manning. *BN*. 178.
 - Diplomatic correspondence with belligerents in 1915 regarding foodstuffs. 74.
 - A Diplomatic History of the American People. T. A. Bailey. *BR*. 543.
 - Enforcement of multipartite administrative treaties in. H. Reiff. *LA*. 661.
 - European war of 1939, status. E. Borchard, *Ed*, 697; C. Eagleton, *Ed*, 699; C. G. Fenwick, *Ed*, 697; Q. Wright, *Ed*, 685.
 - Export Trade, Protection of. F. B. Sayre. *BN*. 560.
 - Far Eastern policies. W. W. Willoughby. *LA*. 193.
 - Foreign Policy. Financial Questions in. J. W. Gantenbein. *BN*. 180.
 - Foreign Relations, 1924, *BR*, 756; Documents on, 1938-1939, *BR*, 543; Lansing Papers, 1914-1920, *BR*, 756.
 - Nationality laws, revision of. R. W. Flournoy. *LA*. 36.

- Neutrality. Trial and Failure. C. G. Fenwick. *BR.* 755.
- Neutrality Act of 1939. P. C. Jessup, *Ed.* 95; international law as affected by, Q. Wright, *LA.* 238; power to declare neutrality, Q. Wright, *Ed.* 302.
- Change of neutrality legislation during war. C. Eagleton. *Ed.* 99.
- Can America Stay Neutral? Dulles and Armstrong. *BR.* 373.
- Panama Canal. Act of 1902, 422, 433; Act of 1909, 428; Act of 1912, 602, 606; Act of 1916, 624; Act of 1922, 608, 610; law and regulations on aircraft in Panama Canal Zone, 632.
- Rights in the Panama Canal. N. J. Padelford. *LA.* 416, 601.
- Right of intervention in Panama. N. J. Padelford. *LA.* 435.
- Preparation of pharmacopoeias in. 675.
- President of United States. Power to declare neutrality. Q. Wright. *Ed.* 302.
- Prizes in neutral ports. The City of Flint. C. C. Hyde. *Ed.* 89.
- Propaganda, international. Attitude regarding. 63, 64, 67, 68, 71.
- Representation of belligerent states. 643, 649, 652, 655.
- Senate. Its History and Practice. G. H. Haynes. *BN.* 374.
- Discussion of proposed sale of torpedo boats to Great Britain, 569; action on law of June 28, 1940, 571.
- Report on general treaty with Panama of 1936. 437.
- Reservation on Panama tolls repeal law. 606.
- State Department:
- Inside the. B. D. Hulen. *BR.* 371.
- Circular of 1914 on contraband and neutrality. *Cited.* 685, 694.
- Sudden & Christenson. Act for relief of, 751; Arbitral Award, *JD.* 737.
- Tobin and Bidwell, Mobilizing Civilian America. *BN.* 782.
- Trade Agreements. J. D. Larkin. *BN.* 780.
- Whales, coöperation in conservation of. E. C. Stowell. *Ed.* 324.
- Universal Postal Convention. Disputed interpretation. 673.
- Unrecognized governments. Special agents to. H. W. Briggs. *LA.* 54.
- Van Dyke, Vernon. State responsibility for international propaganda. *LA.* 58.
- Van Hamel, G. A. De Internationale Arbitrages van Nederland. *BN.* 176.
- Van Houtte, Jean. La Responsabilité Civile dans les Transports Aériens Intérieurs et Internationaux. *BN.* 776.
- Van Vollenhoven, C. Criticism of Vattel's interpretation of Grotius. 410.
- Vandenbosch, A. *BR.* Huart, 539; van Hamel, 176; Telders, 779.
- Vatican and Italy at War. S. W. Halperin. *BR.* 547.
- Vattel. Quoted on war and neutrality. 392, 397, 410, 501.
- Venezuela-United States. American relations with insurgent government, 1879. 53.
- Venturini, Giancarlo. Il Protettorato Internazionale. *BN.* 562.
- Versailles Treaty. Revisions of. W. E. Stephens. *BR.* 186.
- Vinacke, Harold M. *BN.* Jennings, 558.
- Visit and search. Diversion of merchantmen. C. Eagleton, *Ed.* 315; P. C. Jessup, *Ed.* 312.
- Vitta, Edoardo. La Validité des Traités Internationaux. *BR.* 760.
- Walsh, David I. Statements regarding proposed sale of torpedo boats by United States to Great Britain. 570, 572, 733.
- Walz, G. A. Inflation im Völkerrecht der Nachkriegszeit, *BN.* 376; Nationalboykott und Völkerrecht, *BN.* 179.
- Wambaugh, Sarah. *BN.* Kaltenbach, 554; The Saar Plebiscite, *BR.* 541.
- War:
- China-Japan hostilities of 1937. K.K.K. v. Bantham S. S. Co. 55 T. L. R. 503. *JD.* 533.

- Definitions of. 392.
- Economic Causes of. L. Robbins. *BN*. 775.
- Grotius on. D. V. Sandifer. *LA*. 459.
- Keeping out of, and neutrality. G. G. Wilson. *Ed*. 89.
- Limited. Status of United States in European War of 1939. E. Borchard. *Ed*. 697.
- Munitions trade. Nationalization of. A. Bigant. *BN*. 774.
- Naval. Diritto Marittimo di Guerra. R. Sandiford. *BN*. 555.
- Prologue to. E. Wiskemann. *BN*. 556.
- Relation to Society. L. Renn. *BR*. 367.
- Standards of humanitarianism in. R. R. Wilson. *Ed*. 320.
- The Way Out of. C. Saerchinger. *BN*. 557.
- Why? Essays and Addresses on War and Peace. N. M. Butler. *BN*. 772.
- Warbasse, James P. Coöperation as a Way of Peace. *BN*. 182.
- Warren, Charles. Quoted on neutrality. 409.
- Warships:
- Innocent passage. Altmark case. E. Borchard, *Ed*, 289; British Admiralty opinion, 292.
- Sale by neutral to belligerent government. Op. Atty Gen., *JD*, 728; E. Borchard, *Ed*, 690; H. W. Briggs, *LA*, 569; state practice, 581; Q. Wright, *Ed*, 680; L. H. Woolsey, *Ed*, 499.
- Washington Treaty of 1871. Neutrality rules, 503, 577; E. Borchard, *Ed*, 694; H. W. Briggs, *LA*, 577; Q. Wright, *Ed*, 683.
- Western Hemisphere. Meaning in Monroe Doctrine. P. C. Jessup. *Ed*. 709.
- Westlake, John. Quoted on neutrality. 400.
- Whales. United States coöperation in conservation of. E. C. Stowell. *Ed*. 324.
- Wheaton, Henry. Quoted on neutrality. 397.
- White Slavery Convention, 1904. Ineffectiveness of. 675.
- Whittlesey, Derwent. The Earth and the State. *BR*. 366.
- Whitton, John B. *BR*: Rappard, 550; Stephens, 166.
- Wilcox, Francis O. *BN*: Barlow, 556; Benson, 382; Laurie, 382; Lloyd, 382; Seton-Watson, 382; Steiner, 768.
- Wildenhus case. 120 U. S. 1. *Cited*. 608.
- Wilhelmina, The. J. C. Crighton. *LA*. 74.
- Williams, Benjamin H. *BN*: Larkin, 780; Sayre, 560; Wright, 375.
- Williams, E. T. *BN*: Kerner, 185.
- Willoughby, W. W. Far Eastern policies of United States, *LA*, 193; Japan's Case Examined, *BN*, 778; *BN*: Linebarger, 184, Ogg, 559.
- Wilson, George Grafton. Handbook of International Law, *BR*, 362; leased territories, *Ed*, 703; neutrality and keeping out of war, *Ed*, 89; time and international law, *Ed*, 496.
- Wilson, Robert R. Government consent to publication of diplomatic correspondence, *Ed*, 508; neutrality of Éire, *Ed*, 125; standards of humanitarianism in war, *Ed*, 320.
- BR*: Bailey, 543; Foreign Relations of the United States, 1924, 756; Lansing Papers, 756; Silvanie, 166; Symposium on Totalitarian State, 557.
- Wilson v. Shaw. 204 U. S. 24. *Cited*. 428.
- Wilson, Woodrow. Attitude on sale of government-owned arms and munitions during war, 695; message on repeal of Panama tolls law, 605.
- Wireless Convention of 1912. United States failure to enact legislation. 677.
- Wiskemann, Elizabeth. Prologue to War. *BN*. 556.
- de Wolf, Francis Colt. *BR*: Wilson, 362.
- Wood, Bryce. Peaceful Change and the Colonial Problem. *BR*. 762.
- Woolsey, L. H. *BR*: Pfankuchen, 753, Sandifer, 165; cited on continuous voyage, 224; government traffic in contraband, *Ed*, 498; problems of American neutrality, *Ad*, 493; sabotage claims against Germany, *LA*, 23.

World community, neutrality and. Q. Wright. *LA.* 396.

World Federation. O. Newfang. *BN.* 181.

World organization:

Der Kampf um die Völkerordnung. H. K. E. L. Keller. *BR.* 173.

Katholische Solidarität und Volksgemeinschaft. A. Baehr. *BR.* 173.

Völkerrechtliche Grossraumordnung. C. Schmitt. *BR.* 173.

World Politics, Contemporary. Brown, Hodges and Roucek. *BN.* 183.

World Since 1914. W. C. Langsam. *BR.* 766.

World War:

American trading rights during. J. C. Crighton. *LA.* 74.

Interference with neutral mails. 316.

Prize law in: American Civil War precedents. A. M. McDiarmid. *LA.* 220.

The War Behind. F. P. Chambers. *BR.* 171.

Wright, Fergus Chalmers. Population and Peace. *BN.* 375.

Wright, Quincy. *BR.*: Robbins, 775, Wood, 762; international law as affected by U. S. Neutrality Act and Panama resolutions, *LA.* 238; power to declare neutrality under American law, *Ed.* 302; present status of neutrality, *LA.* 391; transfer of destroyers to Great Britain, *Ed.* 680.

Wriston, H. M. Cited on executive agents to unrecognized governments. 56.

Wynne, W. H. *BN.*: Gantenbein, 180.

Yepes, J. M. Commentaire Théorique et Pratique du Pacte de la Société des Nations et des Statuts de l'Union Panaméricaine. *BR.* 759.

Ziegler, Benjamin M. The International Law of John Marshall. *BR.* 542.

Zimmern, Sir Alfred. Criticism of international law, 411, 414; University Teaching of International Relations, *BR.* 544.